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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AMERICAN UNDERWRITERS GROUP, INC.,

Petitioner,

v.

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS SECOND DISTRICT

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QUESTION PRESENTED

Does the construction of a state insurance insolvency statute such as Indiana Code 27-9 resulting in the application of the statute to attorneys-in-fact or agents for subscribers or policyholders of a reciprocal insurer impinge upon the Bankruptcy Code and thus render the state statute unenforceable under the Constitution?

In other words, does the Bankruptcy Code under the Constitution pre-empt the application of a state insurance insolvency statute such as Indiana Code 27-9 to attorneys-in-fact or agents for subscribers or policyholders of a reciprocal insurer?

LIST OF PARTIES

Petitioner American Underwriters Group, Inc., has no parent companies or subsidiaries to be listed pursuant to Rule 29.1.

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The petitioner American Underwriters Group, Inc., ("AUG") respectfully prays that a writ of certiorari issue to review the judgment of the Indiana Court of Appeals, Second District, which reversed the judgment of the trial court in this case.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals is reported at 552 N.E.2d 50 and is reprinted in the Appendix separately filed herewith at A-1.

JURISDICTION

The judgment of the Indiana Court of Appeals was entered on April 10, 1990. The Court of Appeals denied AUG's timely petition for rehearing on June 5, 1990. The Indiana Supreme Court denied AUG's timely petition to transfer this case to that court for review on November 27, 1990. The jurisdiction of this Court is

invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution provides that "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" (art. I, § 8, cl. 4) and that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land" (art. VI, cl. 2).

Section 109 of the Bankruptcy Code, 11 U.S.C. § 109, provides in part:

> (a) . . . only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.
>
> (b) A person may be a debtor under chapter 7 [and chapter 11] of this title only if such person is not (1) a railroad, (2) a domestic insurance company, bank, . . .; or (3) a foreign insurance company, bank, . . . engaged in such business in the United States.

Pertinent provisions of the Indiana Code ("IC") regarding the "Indiana Insurance Law" (IC 27-1), interinsurance (IC 27-6-6), and the rehabilitation and liquidation of an "insurer" (IC 27-9) are set forth in the Appendix.

STATEMENT OF THE CASE

The following facts in the record below are undisputed.

American Interinsurance Exchange ("AIE") is an unincorporated association acting as a reciprocal insurer organized under the interinsurance provisions of IC 27-6-6. Pursuant to those provisions, "subscribers" or policyholders of AIE are authorized to exchange reciprocal or interinsurance contracts with each other providing indemnity among themselves. Such contracts are executed by an "attorney" who is authorized by and acts as an agent for the subscribers. IC

27-6-6-1 and 2 (A-22).

AUG is a regular corporation organized under the Indiana Business Corporation Law and not under the interinsurance provisions. AUG's articles of incorporation empower AUG to act as attorney-in-fact for a reciprocal insurer and further to engage generally in any lawful business. AUG's business activities have included owning and operating other corporations as wholly-owned subsidiaries.

An "Inter-Insurance Certificate of Authority" was issued by the Indiana Department of Insurance ("Department") which authorized AUG as "attorney-in-fact" for the subscribers of AIE "to issue and exchange contracts of inter-insurance under the name and designation of American Interinsurance Exchange." The relationship between AUG

as agent and AIE as principal was established by a "Power of Attorney and Subscribers' Agreement at American Interinsurance Exchange" which was signed by every AIE subscriber and which appointed AUG as agent to exchange insurance contracts in the name of AIE among the subscribers.

Policies of insurance were written in the name of "American Interinsurance Exchange" and not in the name of AUG. All insurance transactions in exchanging AIE contracts were performed by AUG as the appointed agent and attorney-in-fact for the subscribers of AIE. When AUG acted as an agent, AUG executed and signed documents "American Underwriters Group, Inc., as Attorney-in-Fact for the Subscribers at American Interinsurance Exchange." When AUG acted in its own capacity in conducting its own business,

AUG executed and signed documents in its own name.

AUG and AIE maintained separate bank accounts. Insurance premiums on AIE policies were collected by AIE employees and deposited in AIE's bank accounts. Insurance claims arising from AIE insurance contracts were processed by AIE employees and paid from AIE's bank accounts. Expenses of AIE insurance operations were paid from AIE's bank accounts. Separate payroll accounts were maintained for AIE employees who were paid from AIE's bank accounts.

Separate books and records and separate financial statements were prepared for AUG and for AIE. Independent accountants separately audited and reported on those accounts and statements. Insurance claims arising from AIE insurance contracts were

recorded as a liability designated "Loss reserves" in AIE's financial statements. No loss reserves for insurance claims were recorded as a liability in AUG's financial statements.

AUG and AIE filed separate federal and state tax returns with their own identification numbers and never filed consolidated tax returns.

Every three years the Department conducted an examination of AIE. The Department's 1984 examination report of AIE stated that it was an examination of the financial condition and affairs of "American Interinsurance Exchange . . . an Indiana Fire and Casualty, reciprocal insurer." The report stated that AUG acted as the Attorney-in-Fact for the subscribers at AIE and, as AIE's agent, managed AIE's affairs. It further stated "the Exchange writes insurance." The

Department has never found that any assets, accounts or liabilities of AIE were commingled with those of AUG.

As a corporation regulated by the Securities and Exchange Commission, AUG files a Form 10-K on an annual basis. Its 1987 10-K described the legal relationship between AUG and AIE as follows:

> The company has no equity interest in the assets, unassigned surplus and net income of the Exchange. In addition, no liabilities of the Exchange are liabilities of the Company, and no liabilities of the Exchange are transferable to the Company.

An Order of Rehabilitation of AIE under IC 27-9 was entered on April 6, 1988. AUG, acting as Attorney-in-Fact for AIE, consented to the entry of the Order. The President of AUG testified that AUG then ceased acting as the appointed agent for AIE and the agency

relationship was terminated.

On May 4, 1988, the Commissioner of the Department filed a Petition for Rehabilitation of AUG pursuant to IC 27-9. The trial court entered a judgment denying the petition (A-12) which was reversed by the Indiana Court of Appeals.

In construing IC 27-9, the Court of Appeals concluded as a matter of law that AUG is an "insurer" under IC 27-9 on the basis of the certificate of authority issued to AUG. It thus observed that the certificate authorizes AUG "to make contracts of insurance" pursuant to IC 27-6-6-9 "albeit in the name of AIE," and it then jumped to the conclusion that AUG is an insurer "because it is licensed to do insurance business." (A-9). The Court ignored all authorities previously cited by AUG and based its judgment on points never argued by the Commissioner.

How The Federal Question Was Presented

AUG first raised the federal question sought to be reviewed in its petition for rehearing filed with the Court of Appeals on April 30, 1990 (A-123). AUG again raised the federal question in its petition to transfer filed with the Indiana Supreme Court on June 22, 1990 (A-126). In each instance, AUG filed a brief on the merits as well as the timeliness of the question. In each instance, AUG's petition was denied without opinion (A-15, 16).

The Commissioner has argued that AUG raised its federal question too late. The constitutional question is whether the Bankruptcy Code pre-empts the application of IC 27-9 to AUG. That question goes to the state's actual adjudicatory or regulatory power as opposed to the state's substantive laws.

It is the same type of question considered by this Court in International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986), which recognized that the pre-emptive effect of the NLRA "is in the nature of a challenge to a court's power to adjudicate that may be raised at any time." Id. at 382. Davis held that "noncompliance with state procedural rules governing affirmative defenses did not present an independent and adequate state ground" to preclude review of the pre-emption issue which the state court had refused to decide. Id. at 399.

Davis is strikingly similar to this case. The pre-emption issue there turned on the status of Davis under the NLRA. If he was a "supervisor," there was no pre-emption; if he was an "employee," there was. Id. at 394-395. In this case, the pre-emption issue turns on the

question as to whether AUG is a "person" eligible for relief under the Bankruptcy Code or whether AUG is an "insurance company" and thus not eligible under the Bankruptcy Code. In explaining its reasoning for reviewing the pre-emption issue, Davis furthermore cited a bankruptcy case where this Court based its holding on

> Congress' exclusive right to regulate bankruptcy, which gave it the power to vest jurisdiction over bankruptcy proceedings exclusively in one forum and to withdraw that jurisdiction from all other forums, and Congress' statutory exercise of that right.

Id. at 393, n.11.

In a similar vein, AUG has previously cited In re Mader's Store for Men, Inc., 77 Wis.2d 578, 254 N.W.2d 171 (1977), for the proposition that this constitutional argument raises a question of subject matter jurisdiction which cannot be waived. As recognized in Mader's, this

Court has characterized proceedings under state insolvency legislation which is suspended by reason of the enactment of the Bankruptcy Code as being "utterly null and void" and "subject to collateral attack." Id. at 254 N.W.2d 176 & n.1.

AUG also has cited Fort Wayne Patrolman's Benevolent Ass'n v. City of Fort Wayne, 408 N.E.2d 1295, 1300 (Ind. Ct. App. 1980), which held that procedural rules are inapposite where a statute has been declared unconstitutional while a case has not yet completed the appellate process. In raising the federal question, AUG relied in part upon In re Family Health Services, Inc., 104 B.R. 268 (Bankr. C.D. Cal. 1989), ("Family Health Services I"), which denied a motion to dismiss a bankruptcy petition filed by a health maintenance organization because the HMO

was not excluded from the Bankruptcy Code as an "insurance company." That case involved the Commissioner as a party and the provisions of IC 27-9. While it did not decide a constitutional issue, it did consider Indiana law and thoroughly analyzed the predicate of AUG's argument which is that AUG is not an "insurance company." It was not decided, however, until July 25, 1989, which was after this case had been fully briefed in the Court of Appeals. Since this case remained justiciable, this argument should not have been ignored.

Finally, where the decision of the state court is a "surprise" and could not have been reasonably anticipated, raising the federal question for the first time in a petition for rehearing is timely even though the state court says nothing in denying the petition. R. Stern, E.

Gressman, & S. Shapiro, Supreme Court Practice 156-157 (6th ed. 1986). Throughout this case, AUG has cited Underwriters' Exchange v. Indianapolis St. Ry., 204 Ind. 676, 185 N.E. 504, 506-507 (1933), which specifically held that an attorney-in-fact acting for a reciprocal insurer is not an insurer itself. The power of attorney in that case is similar to the power signed by every subscriber of AIE, and the method of doing insurance business in that case is identical to the method in which AIE as an unincorporated association transacted business through AUG as its attorney. That case further considered the very same provisions now appearing in IC 27-6-6-9 (A-32) regarding the certificate of authority which the Court of Appeals considered in this case. The Court of Appeals, however, inexplicably

ignored this precedent.

The Court of Appeals furthermore based its decision on points never argued by the Commissioner at any time. Most importantly, the Commissioner never argued that AUG was licensed to do business as an "insurer" itself. Instead, he has argued that AUG and AIE were inextricably intertwined in a single insurance enterprise. Throughout this case, AUG has also cited Indiana Dept. of Revenue v. American Underwriters, Inc., 429 N.E.2d 306, 311-312 (Ind. Ct. App. 1981), rehearing denied, 431 N.E.2d 528 (1982), which analyzed the relationship between AUG and AIE and ultimately concluded that AUG is a separate and distinct entity for tax purposes. The Court again inexplicably ignored this precedent as well as all other precedents cited by AUG. The Court in fact cited no

precedent whatsoever in its opinion.

For all of the foregoing reasons, AUG's federal question was timely and properly raised.

REASONS FOR GRANTING THE WRIT

I.

By construing IC 27-9 to apply to AUG, the decision below results in a conflict with the Bankruptcy Code and decisions of this Court holding that the Bankruptcy Code pre-empts conflicting state insolvency laws.

The decision below extends the power and jurisdiction of Indiana to a subject matter which this Court has held to be exclusively within the domain of Congress since it exercised its power under the Constitution to establish a national bankruptcy law. Section 109 of the Bankruptcy Code has been drafted to make relief under the Code widely available. Exclusions are limited and carefully delineated. 2 Collier on Bankruptcy ¶

109.01 (15th ed. 1979). IC 27-9 is "tantamount to bankruptcy" and cannot constitutionally be applied to AUG since AUG is not an "insurance company" within the scope of the provisions excluding persons from the Bankruptcy Code.

The Bankruptcy Code pre-empts conflicting state law.

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), was the seminal case enunciating the pre-emptive effect of federal bankruptcy legislation. Sturges was decided at a time when there was no federal bankruptcy law. The question certified in that case was whether any state has authority to pass a bankrupt law since the adoption of the Constitution or whether such power is exclusively vested in Congress. The Court noted that states had the power to pass bankrupt laws before the

Constitution and that the question depended on the "peculiar terms" of the grant of power to Congress. Under those terms, "Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States." Envisioning exclusions such as the very exclusion of insurance companies involved in this case, the Court observed that "Congress may purposely omit to provide for many cases to which their power extends." Id. at 193, 195. Chief Justice Marshall reasoned:

> It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states. . . . If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to Congress,

> it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law.

Id. at 196. Sturges held that

> a state has authority to pass a bankrupt law . . . provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law.

Id. at 208. Since there was no federal law in force then, it was unnecessary to decide whether the state statute in that case was or was not a "bankrupt law."

International Shoe Co. v. Pinkus, 278 U.S. 261 (1929), considered a state statute after Congress passed the Bankruptcy Act. A plaintiff had obtained a judgment against Pinkus who then commenced a suit asking to be adjudged insolvent and for the appointment of a receiver to take and distribute his property as directed by the state statute. The state court complied. The plaintiff then brought an action alleging

that the state statute had been suspended by the passage of the Bankruptcy Act. Citing Sturges and a string of cases, the Court first said:

> A state is without power to make or enforce any law governing bankruptcies that . . . conflicts with the national bankruptcy laws.

Id. at 263-264. The Court then recognized Congress' intent to exclude state action on the subject:

> In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation. It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, [a] choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act, or to provide additional or auxiliary regulations.

Id. at 265 (emphasis added).

Pinkus held that the state statute was an insolvency law. It was so designated in its title, and the state courts treated it as such. It provided for surrender by the insolvent of all non-exempt property to be liquidated by a trustee for the payment of debts under the direction of the court. It classified creditors, prescribed the order of payment of claims, and gave preferences to those fully discharging the debtor in consideration of pro-rata distribution. According to the Court, the state statute operated within the field occupied by the Bankruptcy Act, "and therefore such provisions must be held to have been superseded." Id. at 264, 266.

Again citing Sturges and a string of cases including Pinkus, the Court in

Straton v. New, 283 U.S. 318, 327 (1931), recognized as a

> settled rule that state insolvency laws which are tantamount to bankruptcy because they provide for an administration of the debtor's assets and a winding up of his affairs similar to that provided by the national act are suspended while the latter remains in force, and proceedings under them are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before.

Straton involved a bankruptcy order which enjoined a judicial sale of real estate in a creditor's suit filed in a state court to enforce a judgment lien. The bankruptcy trustee contended that the creditor's suit was a general disposition of the debtor's property and a winding-up proceeding pursuant to state law and was therefore superseded. After stating the above rule, the Court rejected the trustee's contention that the creditor's action was an insolvency proceeding

because the statute providing for such suits said nothing about a distribution of assets among general creditors, and it contained no provision that lien claims which could not be paid due to insufficient proceeds of the sale would be wiped out. Rather, it merely regulated proceedings in equity under an ordinary writ in execution. Id. at 327-329.

IC 27-9 is "tantamount to bankruptcy."

IC 27-9 furnishes an exclusive and comprehensive scheme for the administration of an insurer's assets and the winding up of its affairs. Delinquency proceedings under IC 27-9 include:

> Any proceeding instituted against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving that insurer.

IC 27-9-1-2(d)(1) (A-43). IC 27-9-1-3

(A-45) provides that no person except the Commissioner may commence a delinquency proceeding, that no such action may be entertained except in accordance with IC 27-9, and that no such action may be brought except in the Marion Circuit Court.

IC 27-9-3-2 (A-52) requires that any order of rehabilitation shall appoint the Commissioner as rehabilitator and shall vest title to all assets of the insurer in the Commissioner. IC 27-9-3-3 (A-54) gives the Commissioner plenary power to deal with the insurer's business and property and, subject to court approval, to develop a reorganization plan. IC 27-9-3-7 (A-58) likewise requires that any order of liquidation shall appoint the Commissioner as liquidator and shall vest title to all assets of the insurer in the Commissioner. IC 27-9-3-9 (A-61)

provides for the dissolution of the insurer and grants the Commissioner plenary power to deal with the insurer's business and property, including the power to affirm or disavow contracts. IC 27-9-3-10 and 11 (A-69) provide for the giving of notice and the requirement to file claims. If proper notice is given, the distribution of assets is conclusive as to all claimants. IC 27-9-3-12 (A-75) bars the filing or maintenance of any suits against the insurer or Commissioner after the liquidation order is issued. IC 27-9-3-14--27 (A-79) establish the power of the Commissioner to avoid preferences and fraudulent conveyances. IC 27-9-3-34--39 (A-102) and 41 (A-120) establish procedures for the filing, review, allowance, denial, and adjudication of claims. IC 27-9-3-40 (A-115) establishes a classification and

priority of distribution of all claims.

IC 27-9 thus provides for the involuntary surrender and marshalling of all assets of the debtor for reorganization or liquidation, the assessment of the validity of all creditors' claims, and a classification and priority of distribution for all claims. For Indiana insurance companies, IC 27-9 is the functional equivalent of the Bankruptcy Code, and it is not merely a receivership or assignment for the benefit of creditors. The Commissioner implicitly acknowledged this functional equivalency when he unsuccessfully argued that health maintenance organization insolvencies were subject to IC 27-9 rather than the Bankruptcy Code. Family Health Services I

Indeed, the very existence of such state insurance insolvency laws is the

reason Congress chose not to include insurance companies within the Bankruptcy Code:

> Insurance companies are among those entities precluded from being debtors under the Code because Congress has determined not to interfere with the state's comprehensive liquidation scheme.

In re Cash Currency Exchange, Inc., 37 B.R. 617 (N.D. Ill. 1984), aff'd, 762 F.2d 542, 556 (7th Cir. 1985), cert. denied, 474 U.S. 904 (1985) ("Cash Currency").

It cannot seriously be maintained that IC 27-9 does not conflict with the Bankruptcy Code if it is to be applied to a debtor who may be eligible for bankruptcy relief. By virtue of IC 27-9-1-3 (A-45), the Commissioner is the only person who may commence an insolvency proceeding against an insurer, and the Marion Circuit Court is the only

court which may entertain any such proceeding. The effect of the Indiana scheme is to deny creditors of entities covered by IC 27-9 and the entity itself the right to avail themselves of the benefits of the Bankruptcy Code. That effect is fatal because "a corporation may not be precluded by state law from availing itself of federal bankruptcy law." Cash Currency, 762 F.2d at 552.

The main purpose of the federal bankruptcy law has been the equal treatment of all creditors and equal distribution of the debtor's property. Buchanan v. Smith, 83 U.S. 277, 301 (1873); Mayer v. Hellman, 91 U.S. 496, 501 (1876); Boese v. King, 108 U.S. 379, 386 (1883). It should be noted that the 1978 Bankruptcy Act eliminated the provision for discharge of debts of corporations and other nonindividuals,

and discharge is thus not an essential element or purpose of the federal bankruptcy law. In re Quanta Resources Corp., 739 F.2d 912, 915 n.7 (3d Cir. 1984), aff'd, 474 U.S. 494 (1986).

IC 27-9 clearly conflicts with the purpose and intent of the federal bankruptcy scheme. In considering the scheme of IC 27-9, Family Health Services I found three areas of conflict: (1) the Bankruptcy Code provides unsecured creditors with significant powers and protection not afforded under IC 27-9; (2) IC 27-9 grants a preferential priority for payment of claims which "is anathema to the basic tenet of federal bankruptcy law"; (3) the Bankruptcy Code, unlike IC 27-9, provides a nationwide, uniform and pervasive system for the reorganization of financially distressed companies. 104 B.R. at 277-278. The

conflict between IC 27-9 and the Bankruptcy Code is so fundamental and pervasive that IC 27-9 cannot be applied to any entity eligible to be a debtor under the Bankruptcy Code.

AUG is not an "insurance company."

If an attorney-in-fact such as AUG is not an "insurance company" as that term is used in Section 109(b) of the Bankruptcy Code, an attempt to subject such entities to a state insolvency scheme such as IC 27-9 runs afoul of the Supremacy Clause. The critical question thus is: what is meant by "insurance company" as that term is used in the list of excluded entities in Section 109(b)?

The Bankruptcy Code does not define any of the entities enumerated in Section 109(b). Three different tests identified infra have evolved for determining those entities. All three tests lead to the

same conclusion: an attorney-in-fact, such as AUG, is not an insurance company for purposes of Section 109(b) and, hence, is not excluded from the Bankruptcy Code.

The Independent Classification Test

In applying this test, a court is guided by its own construction of the Bankruptcy Code. Family Health Services I, 104 B.R. at 272; Cash Currency, 37 B.R. at 621. This test ultimately seeks to determine whether the entity at issue performs the essential functions of one of the entities enumerated in Section 109(b). For example, courts seeking to determine whether various entities are "banks" have examined the powers of such entities to see if they are authorized to perform the "essential function" of a bank -- to accept deposits. See Cash Currency, 37 B.R. at 626; In re Republic

Trust & Savings Co., 59 B.R. 606, 613 (Bankr. N.D. Okla. 1986); In re Southern Industrial Banking Corp., 59 B.R. 978, 985 (E.D. Tenn. 1986).

In the matter of insurance, courts have held that the central, indispensable element of an insurance company is the underwriting or spreading of a risk. Family Health Services I, 104 B.R. at 275; In re Family Health Services, Inc., 104 B.R. 279, 284 (Bankr. C.D. Cal. 1989) ("Family Health Services II"). In so holding, those cases relied on Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979), cert. denied, 469 U.S. 1160 (1985), which construed the phrase "business of insurance" in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. Royal Drug stated that the indispensable element of insurance is the underwriting and spreading of a

policyholder's risk, and a second, critical aspect of insurance is the existence of a contract between the insured and the insurer. Id. at 215.

The Royal Drug test demonstrates conclusively that under Indiana law an attorney-in-fact, such as AUG, does not engage in the business of underwriting risks and it is not a party to the insurance contract. Underwriters' Exchange, supra at 185 N.E. 506-507, recognized the function of an attorney-in-fact:

> . . . the fact must not be overlooked that reciprocal or interinsurance contracts are distinguishable from all other forms of insurance, in that every insured is an interinsurer and every insurer is insured. [The attorney-in-fact] is neither an insurer or insured. It has suffered no loss. While it was the medium through which the loss was paid, such payment tended to deplete only the account of the subscribers.

(Emphasis added.) Under Indiana law an

attorney-in-fact, such as AUG, neither underwrites the risk insured against ("It has suffered no loss") nor is a party to the insurance contract (it "is neither an insurer or insured"). Thus, under this test, AUG does not possess the essential elements of an insurance company, and it is not, therefore, excluded from the Bankruptcy Code.

The State Classification Test

Under this test, courts look primarily to state law to determine the nature of an entity for purposes of Section 109(b). Recent cases, however, make clear that the issue is not controlled by state law:

> The "state classification test" was somewhat illusory, for no State scheme could override Congress' own intention as to who should be eligible for bankruptcy relief . . .

In re Republic Trust & Savings Co., supra at 59 B.R. 611. Family Health Services

II made the same point at 104 B.R. 283:

> Congress dictates which entities are precluded from seeking bankruptcy relief and Congress has not delegated that authority to the states. Therefore, a state can never transform an eligible entity . . . into an insurance company, which is ineligible under Section 109.

This test thus looks beyond any simple labels applied by state law and instead considers a variety of factors. An excellent example of the current formulation of this test is described in Family Health Services I at 104 B.R. 273:

> Under the state classification test the court examines the law of the state of incorporation to determine the character of an entity for section 109 purposes. The analysis begins with whether the state law classifies the entity as one specifically excluded from being a debtor under section 109(b)(2). Next, the court may conduct a functional analysis, comparing the powers of the entity to be classified with those of entities excluded from bankruptcy relief. Finally, the court may examine the state statutes for characteristics common to excluded entities, those entities which conduct business of a public or

> quasi-public nature and are subject to extensive state regulation including a statutory scheme for liquidation or rehabilitation.

The first inquiry thus is whether AUG is treated as an insurance company under Indiana law. It most assuredly is not. The "Indiana Insurance Law" IC 27-1-2-1 (A-17) at IC 27-1-2-3(d) (A-17) defines "company" or "corporation" to mean an "insurance company." IC 27-1-2-3 then defines three different types of "companies" or "corporations" (i.e., three types of "insurance companies"), only one of which is relevant here:

> (e) The term "domestic company" or "domestic corporation" means an insurance company organized under the insurance laws of this state.

(A-17) (emphasis added). IC 27-1-6 then sets forth detailed statutory procedures and requirements for the formation of a "domestic corporation" "under the insurance laws" of Indiana.

The fact that AUG is not an insurance company under IC 27-1-2-3 is obvious: AUG was formed, not under the "insurance laws" of Indiana, but under Indiana's general corporate code now codified at IC 23-1. The general corporate code at IC 23-1-22-1(b) has provided:

> Corporations may be organized for pecuniary profit under this act for any lawful purpose or purposes, except . . . for the conduct of a[n] . . . insurance . . . business.

Indiana's Business Corporation Law and its Insurance Law are thus mutually exclusive -- an insurance company must be organized under the Insurance Law and cannot be organized under the Business Corporation Law.

Further evidence that AUG is not an insurance company under Indiana law is found in its name: "American Underwriters Group, Inc." The absence of the word "insurance" in its name is

significant because IC 27-1-6-3 (A-19) provides that the name of any insurance company organized under the Indiana Insurance Law "shall contain the word 'insurance'."

Other significant differences between corporations organized under IC 23-1, like AUG, and insurance companies organized under IC 27-1 abound. If this Court grants the writ, AUG will demonstrate such differences regarding procedures for incorporating; contents of articles of incorporation; requirements as to directors; restrictions on dividends and distributions; requirements as to corporate officers; amendments to articles of incorporation; mergers; voluntary dissolution; regulation of acquisition of controlling shareholder interests. The ability of insurance companies to establish subsidiaries, such

as the subsidiaries of AUG, is severely restricted by IC 27-1, while corporations organized under IC 23-1 are encumbered by no such restrictions.

An analysis of such differences in Family Health Services I led the Court to conclude that a health maintenance organization ("HMO") was not classified as an insurance company under Indiana law:

> Maxicare Midwest does not purport to be a "domestic insurance company" in its corporate name, its articles of incorporation or under the laws of the three states [Indiana, Illinois, Ohio].

104 B.R. at 273. The Court further noted that individual statutory schemes for the regulation of HMOs and insurance companies confirmed their separate treatment under the laws of Indiana. It thus referred to IC 27-8-7-17 which states that "Indiana insurance law does not apply to the operation of prepaid

health care delivery plans" except as specifically provided. It also noted differences in statutory definitions regarding insurers and HMOs. Id. at 274-275.

AUG is no more classified as an insurance company under Indiana law than is an HMO. Like an HMO, AUG is not an insurance company "in its corporate name, its articles of incorporation or under the laws of" Indiana. Like IC 27-8-7-17, IC 27-6-6-14 (A-37) states that "no law of this state relating to insurance shall apply to the exchange of indemnity contracts described herein [IC 27-6-6] unless they are specifically mentioned therein." Unlike a reciprocal association such as AIE, an attorney-in-fact such as AUG is not specifically mentioned in the definition of an "insurer" in the Indiana Insurance

Law at IC 27-1-2-3(x) (A-17) which states:

> The term "insurer" means a company, firm, partnership, association, order, society or system making any kind or kinds of insurance and shall include associations operating as Lloyds, reciprocal or inter-insurers, or individual underwriters.

(Emphasis added).

The next step under this test is to engage in a "functional analysis" to determine whether the entity at issue exercises the same powers as an insurance company. In Family Health Services I, the Court's analysis in this respect was the same as described in the above discussion of the independent classification test, i.e., the Court relied on Royal Drug for the proposition that the "central indispensable element of an insurance company is the underwriting or spreading of risk." Based on that analysis, the Court concluded that an HMO was not the

functional equivalent of an insurance company. As noted earlier, the same conclusion is compelled in this case because AUG did not underwrite any risks, and it therefore is not the functional equivalent of an insurance company.

The final step under this test is to examine the entity at issue for characteristics similar to those shared by the entities enumerated in Section 109(b). Characteristics most commonly examined are the extent of a state regulatory scheme, including liquidation proceedings, and whether the business is of a public or quasi-public nature. See Family Health Services I, 104 B.R. at 276; In re Southern Industrial Banking Corp., supra at 59 B.R. 982. The significance of this aspect of the test, however, is non-existent when, as in this case, it

has already been shown that the entity at issue is not treated as an insurance company under state law and is not the functional equivalent of an insurance company:

> Whether or not HMOs are regulated and liquidated under a state statutory scheme, however, is of little assistance in deciding whether an HMO is the substantial equivalent of an insurance company under state law. Maxicare Midwest is not transformed into an insurance company by providing for its liquidation under the supervision of the Illiois [sic] Director of Insurance, Indiana Commissioner of Insurance and the Ohio Superintendent of Insurance.
>
> Today's ruling is consistent with other decisions which have given little or no weight to statutory liquidation schemes in applying the state classification test. For example, in Cash Currency, the Seventh Circuit held that under the state classification test, a statutory scheme for an entity's liquidation has never been deemed sufficient to classify that entity as one excluded under section 109(b)(2). . . .
>
> Thus, the courts have rejected the argument that by providing for liquidation of an entity under the

> banking or insurance laws, the state thereby classifies the entity as one excluded under section 109(b)(2).

Family Health Services I at 104 B.R. 276 (citations omitted and emphasis added).

In arguing that AUG is an insurance company under Section 109(b), the Commissioner has asserted that AUG is not an HMO and whether an HMO is treated as an insurance company is not dispositive of this case. Citing two cases, he says there is a split of authority on that question. Both of those cases, however, cited and ultimately focused on the same fundamental insurance concept of the underwriting and spreading of a policyholder's risk as stated in Royal Drug. Both cases thus concluded that the providing of medical services as opposed to direct indemnification was merely a service in kind rather than cash, and there was no functional difference

between an HMO and an insurance company from the viewpoint of the subscribers or policyholders of the HMO. In re Beacon Health, Inc., 105 B.R. 178, 186-187 (Bankr. D. N.H. 1989); In re Portland Metro Health, Inc., 15 B.R. 102, 104-105 (Bankr. D. Or. 1981). Neither case considered Indiana law.

The Commissioner has also cited In re International Underwriters, Inc., 157 F. Supp. 367 (W.D. Mo. 1957), which applied the independent and state classification tests to an attorney-in-fact of a reciprocal and concluded that the attorney was an insurance company for purposes of the Bankruptcy Act. That case was decided before Royal Drug, but in reaching its conclusion, the Court in fact focused on the same fundamental insurance concept of the underwriting and spreading of a policyholder's risk

recognized in Royal Drug. It thus said:

> Second, petitioner asserts that the attorney in fact is not an insurer because it runs no risk of being required to pay a beneficiary or insured a larger sum of money than the amount paid in by that person. Concededly, risk is an essential factor of the insurance business, and in the absence of risk imposed upon an entity, regardless of the other like functions it performs, it is not an insurer.

Id. at 371 (emphasis added).

After noting that the reciprocal policy limited the liability of subscribers to the fee and premium stated in the policy, the Court based its conclusion on its construction of a Missouri statute which provided:

> If at any time the amounts [of reserves] on hand are less than the requirements of sections 375.840 and 375.850, the subscribers or their attorney [original emphasis] for them shall make up the deficiency.

The Court construed the statute to mean that a deficiency in reserves must be made up by the attorney and that risk was

thus assumed by the attorney under the Missouri law. Id. While the power of attorney in this case similarly limits liability and Indiana has a statute with similar language, risk is clearly not assumed by the attorney under the Indiana law.

IC 27-6-6-6 (A-28) concerns maintenance of reserves and provides in part:

> If at anytime the assets so held in cash or such securities shall be less than required above . . . the subscribers or their attorney for them shall make up the deficiency . . . .

In Wysong v. Automobile Underwriters, Inc., 204 Ind. 493, 184 N.E. 783, 787 (1933), the Indiana Supreme Court construed that provision to mean:

> It is up to the attorney and subscribers whether or not they desire to make up the deficiency, if there is one, and continue in business, or whether they desire to refuse and go out of business.

> The word "shall" in the sentence contained in section 6 (Burns' 1926, § 9313), wherein it is said "shall make up the deficiency," should be construed to mean "may" in order to give effect to the evident intent of the Legislature in enacting the Reciprocal Act of Insurance.

(Emphasis added). According to Wysong, AUG clearly has the option not to continue business as attorney-in-fact for AIE as has happened in this case, and in such circumstances, AUG cannot be required to make up any deficiency. AUG thus does not assume any risk and is not an insurer under Indiana law.

Although International Underwriters cites Wysong in the course of its opinion, it does not cite Wysong as support for its construction of the Missouri statute which is obviously contrary to the Wysong construction of the Indiana statute above. International Underwriters is also contrary to

Underwriters' Exchange, supra at 185 N.E. 506-507, where the Indiana Supreme Court held that an attorney-in-fact is not an insurer and cannot be compelled to pay any loss in the insurance operation. It is further contrary to Ind. Dep't of Revenue, supra at 429 N.E.2d 311, where the Indiana Court of Appeals recognized:

> All assets of [AIE] are subject to the liability of the insurance operation, but none of the assets of [AUG] are available to those claimants.

The only other case cited by the Commissioner with regard to this issue involved a reciprocal insurer and not an attorney-in-fact nor Indiana law. In re Manufacturing Lumbermen's Underwriters, 18 F. Supp. 114 (W.D. Mo. 1936).

After marching through all the steps in this test, there is only one conclusion: AUG is not treated as an insurance company under Indiana law.

The Alternate Relief Test

This test was first articulated in In re Republic Trust & Savings Co., supra at 59 B.R. 614. The key question of this test is whether a federal bankruptcy proceeding is a satisfactory alternative to a state insolvency proceeding. Family Health Services I, 104 B.R. at 277.

The Family Health Services cases focused on three critical distinctions between the relief available under the Bankruptcy Code and state insurance insolvency statutes, one of those being IC 27-9: (1) the protections afforded unsecured creditors under the Bankruptcy Code which are not afforded under the state statute; (2) the preferential treatment given to loss claimants under the state statutes which "is anathema to the basic tenet of federal bankruptcy law"; and (3) the clear policy of the

Bankruptcy Code for a nationwide and uniform system of insolvency laws. Id. at 104 B.R. 277-278, 287-288. Based on those distinctions, the Court concluded that under this test, the Bankruptcy Code provided satisfactory relief and that HMOs were not, therefore, insurance companies under Section 109(b). Those distinctions are equally true in this case.

Summary Of The Tests

As the foregoing analysis demonstrates, under each of the three tests it is clear that AUG is not an insurance company for purposes of Section 109(b). Therefore, if Indiana's insurance insolvency statute is construed as it was in this case to include attorneys-in-fact such as AUG, there is a collision between the Bankruptcy Code and IC 27-9. Under the authorities cited

above, it is the Bankruptcy Code rather than the Indiana statute which survives that collision.

The pre-emption issue does not arise only when bankruptcy proceedings are initiated.

The Commissioner has previously mischaracterized AUG's argument by asserting that AUG is contending the Bankruptcy Code "generally pre-empts" IC 27-9. AUG is not presenting any such contention. AUG contends that the Bankruptcy Code pre-empts IC 27-9 specifically as to attorneys-in-fact who act as agents and not as insurers, such as AUG, because they are not excluded from the Bankruptcy Code and they therefore cannot be subjected to an insolvency statute such as IC 27-9 which is tantamount to bankruptcy as previously demonstrated.

The Commissioner has extended his

mischaracterization of AUG's argument by asserting that AUG's argument taken to its logical conclusion would require pre-emption of other state statutes involving receiverships and assignments for the benefit of creditors. In that regard, he has claimed that even if AUG is not an insurance company excluded from the Bankruptcy Code, the application of IC 27-9 to AUG would not be pre-empted unless and until a bankruptcy proceeding is initiated.

The Commissioner's argument is confusing and misleading. If AUG is not an insurance company, there obviously is no basis whatsoever for the application of IC 27-9 to AUG. If IC 27-9 is applied, it establishes an exclusive and comprehensive scheme precluding the availability of any alternative "for the purpose of liquidating, rehabilitating,

reorganizing or conserving" an insurer as AUG has argued in demonstrating that IC 27-9 is tantamount to bankruptcy. IC 27-9 does not compliment or augment the Bankruptcy Code to any extent, but rather it entirely displaces the Bankruptcy Code as to those entities subject to its provisions. AUG is not contending that the Bankruptcy Code pre-empts other state statutes involving receiverships or assignments for the benefit of creditors which are not tantamount to bankruptcy.

The Commissioner has cited Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518 (1933), which he has also mistakenly characterized as holding that a state statute providing for an assignment for the benefit of creditors was not suspended or pre-empted due to the fact that the proceedings under the statute could be terminated by the timely filing

of a bankruptcy petition. The decision in Pobreslo was in fact based upon the analysis of the state statute itself which was found not to be tantamount to bankruptcy.

This Court in Pobreslo compared the state statute to the one involved in International Shoe Co. v. Pinkus, supra, which was held to be tantamount to bankruptcy and found significant differences. The proceedings in Pinkus were under a state insolvency law and not under the law governing assignments for the benefit of creditors. The statute in Pobreslo regulating the administration of trusts created by assignments for the benefit of creditors applied whether the assignor was solvent or insolvent. It did not prevent creditors from bringing action against the debtor. In harmony with the Bankruptcy Act, it served to

protect creditors against each other and to assure equality of distribution unaffected by any requirement or condition. 287 U.S. at 525-526. Pobreslo thus reaffirms Pinkus and is consistent with AUG's argument.

Other cases cited by the Commissioner regarding his argument likewise acknowledge the decisions of this Court cited by AUG. According to those decisions, the pre-emption of a state insolvency statute occurs whenever the state law conflicts with the national law of bankruptcy. It is the conflict of such laws which gives rise to the pre-emption of the state law. The issue is not dependent upon the initiation of a bankruptcy proceeding to be ripe for consideration. There was in fact no bankruptcy proceeding in Pinkus.

II.

The decision below that an attorney-in-fact such as AUG is an insurer subject to an insurance insolvency statute such as IC 27-9 raises important questions which should be settled by this Court.

AUG was an agent and not an insurer. The logic of the opinion below means that any agent licensed by the Indiana Department of Insurance is subject to the exclusive insolvency proceedings of IC 27-9 as an insurer simply because of the fact that the agent has a license or certificate of authority from the Department to do insurance business, "albeit in the name of" a principal. All agents licensed to do insurance business are regulated by their licensing authority. Congress, however, has chosen to exclude insurance companies but not insurance agents from the Bankruptcy Code. The logic of the opinion below

threatens to undermine the boundary drawn by the Constitution and prior principles established by this Court regarding the exclusive power and jurisdiction of Congress on the subject of bankruptcy.

This Court has not directly addressed the different tests as they have evolved today to determine who may be excluded from the scope of the Bankruptcy Code and thus subjected to the plenary power of the states under a statute such as IC 27-9. Bankruptcy today is becoming more and more a part of our society. This Court in the past has provided uniformity and guidance to lower courts on the subject of bankruptcy, and it is now time for this Court to do so again.

CONCLUSION

For all of the foregoing reasons, AUG respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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(4)

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AMERICAN UNDERWRITERS GROUP, INC.,

Petitioner,

v.

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS SECOND DISTRICT

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IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT

No. 49A02-8903-CV-105

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Appellant (Petitioner Below),

v.

AMERICAN UNDERWRITERS GROUP, INC.,

Appellee (Respondent Below).

Appeal from the
Marion Circuit Court
The Honorable Judith S. Proffitt,
Special Judge
49C01-8804-MI-1016-A

SHIELDS, P.J.

Harry E. Eakin, as the Insurance Commissioner (Commissioner) of the Department of Insurance of the State of Indiana (Department) appeals the adverse judgment in its action against American

Underwriters Group, Inc. (AUG).

We reverse.

ISSUE

1. Whether AUG, the attorney-in-fact for American Interinsurance Exchange (AIE), an unincorporated association in rehabilitation, is subject to the provisions of IC 27-9 providing for delinquency proceedings by the Commissioner.

2. Whether the Commissioner met his burden of proving AUG is in such condition as to render the continuance of its business financially hazardous to its policyholders, creditors or the public.

FACTS

The facts are undisputed.

AIE is a reciprocal insurer organized under the interinsurance provisions of IC 27-6-6-1 et seq. AUG is an Indiana corporation organized under the Indiana

Business Corporation Law, IC 23-1.

AUG is the attorney-in-fact for AIE and was issued an "Inter-Insurance Certificate of Authority" by the Department. The certificate reads:

> Whereas, American Underwriters Group, Inc., Attorney-in-fact for certain individuals, partnerships and corporations desiring to exchange contracts of inter-insurance under the name and designation of American Interinsurance Exchange with the principal office of such exchange located at Indianapolis in the State of Indiana has complied with the laws of Indiana authorizing and regulating the exchange of such contracts:
>
> Now, Therefore, the said American Underwriters Group, Inc. as such Attorney-in-fact, and as far as it may be legally empowered by it's [sic] letter of appointment as such attorney, is hereby authorized and empowered to issue and exchange contracts of inter-insurance under the name and designation of American Interinsurance Exchange at Indianapolis in the state of Indiana insuring the members of such exchange in this State against loss . . . for the

> year ending perpetual unless suspended or revoked.

Record at 311. Accordingly, every insured/insurer executed a "Power of Attorney and Subscribers' Agreement." It reads:

> Subscriber authorizes Attorney-in-Fact, on Subscriber's behalf, to effect, modify and terminate contracts containing such terms as Attorney-in-Fact may deem suitable to provide any and all forms of insurance; to collect all monies due; to give, waive, or receive all notices and proof of losses; to settle all losses and claims under insurance contracts herein authorized; to cede and assume reinsurance; to accept and authorize others to accept service of process and appear in behalf of Subscriber in any suits, actions or proceedings, and to bring, prosecute, defend or otherwise settle suits, actions or proceedings; to perform every act not herein specified that the Subscriber could individually perform in relation to any contract herein authorized, appropriate to its proper and lawful execution and performance; . . .
>
> Subscriber authorizes the

> Attorney-in-Fact to pay out of the funds of Subscriber the cost of reinsurance, collection expense, investment expenses, losses, damages, judgments, court costs, legal expenses, loss adjustment expenses, license fees, taxes, inspection expenses, audits, examinations, rating bureaus, insurance trade and service organizations, bonds as required herein, brokerage and agency expenses and commissions.

Record at 313.

In addition, AUG's obligations and duties to the subscribers of AIE and to the Department are regulated by statute. See IC 27-6-6-1 et seq.

AUG deducted 15% of all monies received and due AIE as a fee for its services. As of December 31, 1987 AUG had overpaid itself fees in the amount of $91,238. In addition, by the time of the hearing on the rehabilitation petition AUG had failed to make payment of a $750,000 debenture due AIE on June 28,

1988. Also, at the hearing, the undisputed evidence was that AUG was insolvent by approximately $370,000.

On April 6, 1988 the Commissioner filed a petition for the rehabilitation of AIE. On that same day, AIE was placed into rehabilitation after consent was given by AUG's Board of Directors pursuant to IC 27-9-3-1 (1988). On May 4, 1988 the Commissioner filed a petition to rehabilitate AUG on the grounds reasonable cause existed to believe AUG was in such condition as to render the continuance of its business financially hazardous to the public, to AIE, and to AUG's creditors. The trial court denied the petition after a hearing, and the Commissioner appeals.

DECISION

I.

The first issue is one of statutory

construction: did the legislature give the Department authority to petition for the rehabilitation of AUG under IC 29-9 (sic) (article 9). Principles of the common law of agency are irrelevant.

AUG is an insurer doing business in Indiana because it has done and is licensed to do insurance business under a license or certificate of authority as an insurer issued by the Department, and it is, therefore, subject to article 9.

IC 27-9-1-1 (1988) provides article 9 applies to, among others, "(1) [a]ll insurers who are doing, or who have done, insurance business in Indiana, and against whom claims arising from that business may exist." In turn, IC 27-9-1-2(m) (1988) defines "insurer" as "any person who: (1) has done, purports to do, is doing, or is licensed to do insurance business; and (2) is subject to

the authority of any insurance commissioner as to liquidation, rehabilitation, reorganization, supervision, or conservation." The remaining relevant term, "doing business," includes:

> (1) The issuance or delivery of contracts of insurance to persons resident in Indiana.
> (2) The solicitation of applications for contracts or other negotiations preliminary to the execution of contracts.
> (3) The collection of premiums, membership fees, assessments, or other consideration for contracts.
> (4) The transaction of matters subsequent to execution of contracts and arising out of them.
> (5) Operating under a license or certificate of authority, as an insurer, issued by the insurance department.

IC 27-9-1-2(e) (1988).

AUG has a certificate of authority issued by the Department as provided by IC 27-6-6-9 (1988):

> Upon compliance with the requirements of this chapter, the insurance department shall

> issue a certificate of authority or a license to the attorney authorizing him to make such contracts of insurance and shall contain the name of the attorney, the location of the principal office, and the name or the designation under which such contracts of insurance are issued. . . .

(Emphasis added.) The certificate of authority is thus issued to AUG as the attorney and authorizes AUG "to make contracts of insurance," albeit in the name of AIE. Hence, AUG is an insurer because it is licensed to do insurance business by the Department and has operated under that license. In addition, claims arising from AUG's "doing business" exist. The undisputed evidence is AIE is owed over $91,000 for overpayments AUG made to itself for service fees. Further, AUG has failed to make payment to AIE of a matured debenture in the face amount of

$750,000. Thus, AUG is subject to the authority of the Commissioner as to rehabilitation under IC 29-9 (sic).

In conclusion, as a matter of law, AUG is an insurer who has done insurance business in Indiana and against whom claims arising from that business exist. Therefore, IC 27-9 applies to AUG and the trial court erred, as a matter of law, in concluding otherwise.

II.

The second issue is whether the Commissioner met his burden of proving AUG "is in a condition that the further transaction of business would be hazardous, financially, to its policy-holders, creditors or the public," the statutory predicate to the Commissioner's petition for AUG's rehabilitation.

The undisputed evidence presented at the hearing is that AUG was insolvent by

approximately $370,000 and that it owed AIE over $841,000. The only reasonable inference from this evidence is that the continued transaction of business by AUG is financially hazardous to its creditor, AIE. Thus, as a matter of law, the Commissioner met his burden of providing the statutory prerequisite for his petition to rehabilitate AUG.

Judgment reversed and cause remanded to the trial court for further proceedings consistent with this opinion.

BUCHANAN, J., CONCURS.

RATLIFF, C.J., CONCURS.

IN THE MARION CIRCUIT COURT OF INDIANA

No. 49C01-8804-MI-1016

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Petitioner,

v.

AMERICAN INTERINSURANCE EXCHANGE,

Respondent.

JUDGMENT

The Liquidator has moved the Court pursuant to Trial Rule 54(B) to enter final judgment on the matters determined by the Court's August 31, 1988, Order, which denied the Verified Petition for Order of Rehabilitation of American Underwriters Group, Inc. The Court determines that there is no just reason for delay, and directs the entry of final judgment in accordance with said Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Court's August 31, 1988, Order is entered as a final judgment on this date for American Underwriters Group, Inc., and against the Liquidator on the Verified Petition for Order of Rehabilitation of American Underwriters Group, Inc.

2. The Liquidator is directed to promptly cause a copy of this Judgment to be mailed to Howard Kahlenbeck, Jr., as attorney for American Underwriters Group, Inc.

Dated: 9-6-88

/s/ Judith S. Proffitt
JUDITH S. PROFFITT,
Special Judge Marion Circuit Court

IN THE MARION CIRCUIT COURT OF INDIANA

No. 49C01-8804-MI-1016

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana

v.

AMERICAN INTERINSURANCE EXCHANGE

ORDER

The Court having taken this matter under advisement and having reviewed the verified petition for order of rehabilitation of American Underwriters Group, Inc. and the evidence introduced at the hearing held on August 9, 1988, the stipulations entered and the briefs filed by all counsel and being duly advised now denies the State's petition for rehabilitation of American Underwriters Group, Inc.

Date: 8-31-88

/s/ Judith S. Proffitt
JUDITH S. PROFFITT,
Special Judge Marion Circuit Court

A-15

STATE OF INDIANA

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE
INDIANAPOLIS, 46204

Cause Number
49A02-8903-CV-00105

LOWER CAUSE
49C018804ME1016A

EAKIN, HARRY E.,

-V-

AMERICAN UNDERWRITERS GROUP, INC.

You are hereby notified that the COURT OF APPEALS has on this day 6/05/90 APPELLEE'S PETITION FOR REHEARING DENIED WITHOUT OPINION. WESLEY W. RATLIFF, JR., CHIEF JUDGE. ALL JUDGES CONCUR.

Witness my name and the seal of said Court, this 5th day of June, 1990.

/s/ Dan Heiser
Clerk Supreme Court,
Court of Appeals and Tax Court

STATE OF INDIANA

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE
INDIANAPOLIS, 46204

Cause Number
49A02-8903-CV-00105

LOWER CAUSE
49C018804ME1016A

EAKIN, HARRY E.,

-V-

AMERICAN UNDERWRITERS GROUP, INC.

You are hereby notified that the SUPREME COURT has on this day 11/27/90 APPELLEE'S PETITION TO TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE. ALL JUSTICES CONCUR.

Witness my name and the seal of said Court, this 27th day of November, 1990.

/s/ Dan Heiser
Clerk Supreme Court,
Court of Appeals and Tax Court

IC 27-1

27-1-2-1. Short title. IC 27-1-2 through IC 27-1-20 shall be known and may be cited as the Indiana Insurance Law. [Acts 1935, ch. 162, § 1, p. 588; P.L. 252-1985, § 3.]

27-1-2-3. Definitions. -- As used in this article, and unless a different meaning appears from the context: . . .

(d) The term "company" or "corporation" means an insurance company and includes all persons, partnerships, corporations, associations, orders or societies engaged in or proposing to engage in making any kind of insurance authorized by the laws of this state.

(e) The term "domestic company" or "domestic corporation" means an insurance company organized under the insurance laws of this state. . . .

(x) The term "insurer" means a

company, firm, partnership, association, order, society or system making any kind or kinds of insurance and shall include associations operating as Lloyds, reciprocal or inter-insurers, or individual underwriters. . . .

[Acts 1935, ch. 162, § 3, p. 588, 1963, ch. 203, § 1; 1977, P.L. 280, § 1.]

27-1-6-1. Incorporators. -- Any number of natural persons, not less than seven (7), all of whom are eighteen (18) years of age or older, at least a majority of whom are residents of the state of Indiana and citizens of the United States, may form a corporation under the provisions of this chapter for the purpose of making any kind or kinds of insurance described in any one class set out in IC 27-1-5-1, other than reciprocal, farm mutual, fraternal, and assessment insurance, by complying with

the provisions of this chapter. [Acts 1935, ch. 162, § 61, p. 588; 1973, P.L. 270, § 1; P.L. 252-1985, § 15.]

27-1-6-3. Corporate name. -- The name of any company organized under this article shall contain the word "insurance" and the word "company," "corporation" or "incorporated," or shall end with an abbreviation of one of these words, except that the word "company" or the abbreviation "Co." may be used only if that word or abbreviation is not immediately preceded by the word "and," or any substitute therefor.

No company organized under this article shall:

(a) Use as a part of its corporate name the words "United States," "Federal," "government," "official," or any word that would imply that the company was an administrative agency of

the state of Indiana or of the United States, or is subject to supervision of any department other than the department of insurance of the state of Indiana.

(b) Take or assume a corporate name the same as, or confusingly similar to, the name of any other insurance company then existing under the laws of this state or authorized to transact business in this state, unless at the same time (1) such other company shall change its corporate name or withdraw from transacting business in this state, and (2) the written consent of such company, signed and verified under oath by its secretary, shall be filed with the department.

Any company organized under this article may change its corporate name at any time by amending its articles of incorporation in the manner hereinafter

provided. The provisions of this section shall not affect the right of any insurance company which is existing under the laws of this state at the time this article takes effect or of any such company which thereafter reorganizes or reincorporates under this article or of any company authorized to transact business in this state at the time this article takes effect to continue the use of its corporate name. [Acts 1935, ch. 162, § 63, p. 588; 1977, P.L. 281, § 3.]

IC 27-6-6

27-6-6-1. Authorization. -- Individuals, partnerships and corporations of this state, hereby designated "subscribers," are hereby authorized to exchange reciprocal or interinsurance contracts with each other or with individuals, partnerships and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under the fire or casualty classifications as authorized by the insurance laws of this state, except title insurance. [Acts 1919, ch. 102, § 1, p. 503; 1967, ch. 232, § 1.]

27-6-6-2. How contracts executed. -- Such contracts may be executed by an attorney, agent or other representative herein designated "attorney," duly authorized and acting for such

subscribers. The office or offices of such attorney may be maintained at such place or places as may be designated by the subscribers in the power of attorney. [Acts 1919, ch. 102. § 2, p. 503.]

27-6-6-3. Filing of declaration - Contents. -- Such subscribers so contracting among themselves shall, through their attorney, file with the insurance department a declaration verified by the oath of such attorney, or where such attorney is a corporation, by the oath of a chief officer thereof, setting forth the following:

(a) The name or title adopted by such subscribers proposing to exchange such indemnity contracts. Such name or title shall not be so similar to any other name or title previously adopted by a similar organization or by any

insurance corporation or association as in the opinion of the insurance department is likely to result in confusion or deception.

(b) The kind or kinds of insurance to be effected or exchanged.

(c) A copy of the form of policy contract or agreement under or by which such insurance is to be effected or exchanged.

(d) A copy of the form of power of attorney or other authority of such attorney under which such insurance is to be effected or exchanged; Provided, That a copy of any amendment to or substitution of such form shall be filed with the insurance department prior to its use.

(e) The location of the office or offices from which such contracts or agreements are to be issued.

(f) That applications have been made for indemnity upon at least one hundred (100) separate risks aggregating not less than one and one-half million dollars ($1,500,000) as represented by executed contracts or bona fide applications to become concurrently effective in the case of fire insurance, and in the case of automobile insurance, executed contracts or bona fide applications for indemnity upon two hundred and fifty (250) separate risks aggregating not less than one and one-half million dollars ($1,500,000) or any or all classes of automobile insurance effected by said subscriber through said attorney.

(g) That there is in the possession of such attorney and available for the payment of losses, assets conforming to the requirements of section 6 [27-6-6-6] of this chapter.

(h) A financial statement under oath prescribed for the annual statement.

(i) The instrument authorizing service of process as provided in this chapter. [Acts 1919, ch. 102, § 3, p. 503; 1963, ch. 315, § 1; 1967, ch. 232, § 2; P.L. 252-1985, § 217.]

27-6-6-4. Service of process. -- Concurrently with the filing of the declaration provided for by the terms of section 3 [27-6-6-3] of this chapter, the attorney shall file with the department of insurance, state of Indiana, an instrument in writing, executed by him for said subscribers, conditiond that, upon the issuance of a certificate of authority provided for in section 9 [27-6-6-9] of this chapter, service of process may be had upon the commissioner of insurance in all suits in this state arising out of such policies, contracts,

or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or interinsurance contracts through such attorney. Two (2) copies of said process with complaint attached shall be served and a fee of three dollars [$3.00] paid to the commissioner at the time of said service; Provided, however, That a writ against the commissioner of insurance in such case shall not be returnable until thirty (30) days after service. It shall be the duty of the commissioner of insurance, upon such service, to promptly send one (1) copy of such summons, by registered letter, to said attorney and to file the other copy of summons in his office. [Acts 1919, ch. 102, § 4, p. 503; 1967, ch. 232, § 3; P.L. 252-1985, § 218.]

27-6-6-5. Statement of maximum of

indemnity. There shall be filed with the department of insurance, state of Indiana, by such attorney, whenever the department of insurance shall so require, a statement under oath of such attorney, showing, in the case of fire insurance, the maximum amount of indemnity upon a single risk, and no subscriber shall assume on any single fire insurance risk an amount greater than ten percent [10%] of the net worth of such subscriber. [Acts 1919, ch. 102, § 5, p. 503; 1967, ch. 232, § 4.]

27-6-6-6. Maintenance of cash or securities for reserves. -- There shall at all times be maintained as assets a sum in cash or securities of the kind designated by the laws of the state where the principal office is located for the investment of funds of insurance companies, doing the same kinds of

business, amounting to fifty per cent (50%) of the net annual deposits, collected, and credited to the accounts of subscribers on policies having one (1) year or less to run and pro rata on those for longer periods; in addition to which there shall be maintained in cash or such securities assets sufficient to discharge all liabilities on all outstanding losses arising under policies issued, same to be calculated on the basis of net premiums or deposits as in this section defined and in accordance with the laws of the state relating to similar reserves for companies insuring similar risks. For the purpose of computing said reserves and assets, net deposits shall be construed to mean the payments of subscribers collected or in the course of collection after deducting therefrom the amounts provided in the subscribers'

agreement for expenses except payments or credits to the attorney-in-fact. If at any time the assets so held in cash or such securities shall be less than required above, or be less than three hundred thousand dollars [$300,000], the subscribers or their attorney for them shall make up the deficiency within thirty [30] days after notice from the department of insurance so to do: Provided, however, That as to reciprocal or interinsurance exchanges now licensed and authorized to do business in Indiana, the alternative minimum of cash or securities required to be held shall be one hundred thousand dollars [$100,000]. [Acts 1919, ch. 102, § 6, p. 503; 1963, ch. 315, §2; 1967, ch. 232, § 5.]

27-6-6-7. Reports - Examination. -- Such attorney shall, within the time limited for filing the annual statement

by insurance companies transacting the same kind of business, make a report under oath to the insurance department for each calendar year showing the financial condition of affairs at the office where such contracts are issued and shall furnish such additional information and reports as may be required. The business affairs, records, and assets of any such organization shall be subject to examination by the insurance department at any reasonable time, and such examination shall be at the expense of the organization examined. Where the principal office of the attorney is located in another state, the insurance department may in lieu of the examination provided for in this section, accept a certified copy of the report of examination made by the insurance department of the state where

the principal office is located. [Acts 1919, ch. 102, § 7, p. 503; 1963, ch. 315, § 3; 1967, ch. 232, § 6.]

27-6-6-8. Right to exchange contracts. Any corporation now or hereafter organized under the laws of this state, shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority as a subscriber to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as much granted as the rights and powers expressly conferred. [Acts 1919, ch. 102, § 8, p. 503.]

27-6-6-9. Certificate of authority - License. -- Upon compliance with the requirements of this chapter, the

insurance department shall issue a certificate of authority or a license to the attorney authorizing him to make such contracts of insurance and shall contain the name of the attorney, the location of the principal office, and the name or the designation under which such contracts of insurance are issued. Such license shall be renewed annually, upon a showing that the standard of solvency required in this section has been maintained and all fees and taxes required have been paid; Provided, no certificate of authority shall be issued under this section unless and until the subscribers and the attorney shall have complied with the same character and fitness qualifications, plan of operation, and standards for officers and directors as is required of stock and mutual insurance companies under this title. [Acts 1919,

ch. 102, § 9, p. 503; 1967, ch. 232, § 7; P.L. 252-1985, § 219].

27-6-6-10. Failure to comply with chapter by attorney - Penalty. -- An attorney who exchanges a contract of insurance of the kind and character specified in this chapter, or solicits or negotiates any application for such a contract, without complying with this chapter, commits a class C infraction. For the purpose of organization and upon issuance of permit by the insurance department, powers of attorney and applications for such contracts may be solicited without compliance with this chapter, but a person may not make or issue any such contracts until this chapter is complied with. [Acts 1919, ch. 102, § 10, p. 503; 1967, ch. 232, § 8; 1978, P.L. 2, § 2722.]

27-6-6-11. Additional penalty -

Revocation of licens. -- In addition to the penalties in section 10 [27-6-6-10] of this chapter and where not otherwise provided, the penalty for failure or refusal to comply with any or all of the terms and provisions of this chapter, upon the part of the attorney, shall be the refusal, suspension, or revocation of certificate of authority or license by the insurance department, after due notice and opportunity for hearing has been given such attorney, so that he may appear and show cause why such action should not be taken. [Acts 1919, ch. 102, § 11, p. 503; 1967, ch. 232, § 9; P.L. 252-1985, § 220.]

27-6-6-12. Taxes, licenses and fees. -- In lieu of all other taxes, licenses or fees, state or local, such attorney shall pay annually on account of the transaction of such business in this

state the same taxes, licenses and fees as are required to be paid by mutual insurance companies with principal office similarly located and transacting the same kind of business. In the application of the retaliatory law, the taxes and fees exacted by another state from an exchange with principal office in Indiana shall apply. [Acts 1919, ch. 102, § 12, p. 503.]

27-6-6-13. Policy provision for reciprocal or interinsurance. -- The attorney may insert in any form of policy prescribed by the laws of this state any provisions or conditions required by the plan of reciprocal or interinsurance, Provided That same shall not be inconsistent with or in conflict with the law of this state. Such policy in lieu of conforming to the language and form prescribed by such law, shall be held to

conform thereto in substance if such policy includes a provision or indorsement reciting that the policy shall be construed as if in the language and form prescribed by such law. Any such indorsement shall first be filed with the insurance department. [Acts 1919, ch. 102, § 13, p. 503; 1967, ch. 232, § 10.]

27-6-6-14. Exchange of indemnity contracts. -- Except as herein provided, no law of this state relating to insurance shall apply to the exchange of indemnity contracts described herein, unless they are specifically mentioned therein. [Acts 1919, ch. 102, § 14, p. 503.]

27-6-6-15. Authorized to assume liability for expenses in establishment of exchange. -- The attorney for the subscribers at a reciprocal or

interinsurance exchange organized under this law may on behalf of the subscribers borrow or assume a loan or advance for the repayment of a sum of money sufficient to defray the reasonable expenses in the establishment of such an exchange or to enable the attorney for the subscribers at the exchange to comply with any requirement of the law or as a guarantee fund upon agreement. The borrowing or assumption shall first be submitted to and approved by the department, and shall be repaid only out of the surplus, earnings or profits at the exchange with the approval of the department. The department shall withhold its approval of any repayment whenever in its judgment the financial condition of the attorney for the subscribers at such exchange shall warrant, but shall not withhold its

approval if after the repayment the attorney-in-fact for subscribers at the exchange shall have and be in possession of a surplus equal to ten percent [10%] or more of the gross annual premium of the subscribers. Any such loan or advance shall not form a part of the legal liabilities of the attorney for the subscribers at the exchange but until repaid, all statements published by the attorney for the subscribers or filed with the department, shall show the amount thereof then remaining unpaid. However, this section shall not be construed as an extension of the liability of any subscriber beyond that expressly provided for in the subscribers' agreement or power of attorney. The per annum interest rate on any loan or advance shall not exceed three-quarters of one percent [.75%]

above the prevailing prime bank rate charged by national banks and banks chartered by the state of Indiana with their principal offices in Indiana, or ten percent [10%], whichever is less. The department shall establish the prevailing prime bank rate for each calendar quarter equal to this rate for the first working day of the subsequent calendar quarter. The prime bank rate for any bank on a given day is the rate of interest it charges on unsecured loans made that day to its most credit-worthy customers. In establishing the prevailing prime bank rate the department may use the prime bank rate charged by the fifteen [15] largest banks with their principal offices in Indiana, or such other number as the department deems adequate. The total amount of interest shall be calculated on a three hundred

sixty [360] day basis. [Acts 1919, ch. 102, § 14a, as added by Acts 1967, ch. 232, § 11; 1977, P.L. 287, § 1.]

IC 27-9

27-9-1-1. Applicability of article. -- Proceedings under this article apply to:

(1) All insurers who are doing, or who have done, insurance business in Indiana, and against whom claims arising from that business may exist.

(2) All insurers who purport to do business in Indiana.

(3) All insurers who have insureds resident in Indiana.

(4) All other persons organized or in the process of organizing with the intent to do an insurance business in Indiana.

(5) All nonprofit service plans, fraternal benefit societies, and beneficial societies.

(6) All title insurance companies.

(7) All prepaid health care delivery plans under IC 27-8-7. [IC 27-9-1-1, as added by Acts 1979, P.L. 255, § 1; P.L. 274-1987, § 16.]

27-9-1-2. Definitions. -- As used in IC 27-9:

. . .

(d) "Delinquency proceeding" means:

(1) Any proceeding instituted against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving that insurer; and

(2) Any summary proceeding under IC 27-9-2-1 or IC 27-9-2-2.

(e) "Doing business" includes the following acts, whether effected by mail or otherwise:

(1) The issuance or delivery of contracts of insurance to persons resident in Indiana.

(2) The solicitation of applications for contracts or other negotiations preliminary to the execution of contracts.

(3) The collection of premiums, membership fees, assessments, or other consideration for contracts.

(4) The transaction of matters subsequent to execution of contracts and arising out of them.

(5) Operating under a license or certificate of authority, as an insurer, issued by the insurance department. . . .

(m) "Insurer" means any person who:

(1) Has done, purports to do, is doing, or is licensed to do insurance business; and

(2) Is subject to the authority of any insurance commissioner as to liquidation, rehabilitation,

reorganization, supervision, or conservation.

For purposes of IC 27-9, other persons included under section 1 [27-9-1-1] of this chapter shall be considered to be insurers. . . .[IC 27-9-1-2, as added by Acts 1979, P.L. 255, § 1.]

27-9-1-3. Judicial proceedings - Restrictions - Jurisdiction - Stay of Indiana proceedings. -- (a) A delinquency proceeding under this chapter may only be commenced by the commissioner. A court may not entertain, hear, or determine a proceeding commenced by any other person.

(b) A court may not entertain, hear, or determine any complaint requesting:

(1) The dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of any insurer; or

(2) An injunction, restraining

order, or other relief preliminary to, incidental to, or relating to those proceedings other than in accordance with this article.

(c) In addition to other grounds for jurisdiction provided by the law, an Indiana court having jurisdiction of the subject matter has jurisdiction over a person served under the Indiana rules of court or other applicable law in an action brought by the receiver of a domestic insurer or an alien insurer domiciled in Indiana if the person served is:

(1) Obligated to the insurer in any way as an incident to any agency or brokerage arrangement that may exist or has existed between the insurer and the agent or broker in any action on or incident to the obligation;

(2) A reinsurer who:

(A) Has at any time written a policy of reinsurance for an insurer against which a rehabilitation or liquidation order is in effect when the action is commenced; or

(B) Is an agent or broker of, or for, the reinsurer in any action on or incident to the reinsurance contract; or

(3) Or (sic) has been an officer, manager, trustee, organizer, promoter, or person in a position of comparable authority or influence in an insurer against which a rehabilitation or liquidation order is in effect when the action is commenced in any action resulting from such a relationship with the insurer.

(d) If it appears to a receiver appointed in a proceeding under this article that there has been criminal or tortious conduct, breach of any contractual or fiduciary obligation, or other unlawful conduct detrimental to the insurer by any director, officer, manager, agent, broker, employee, or other person or entity, the receiver may pursue all appropriate legal remedies on behalf of the insurer.

(e) If the court on motion of any party finds that any action should as a matter of substantial justice be tried in a forum outside Indiana, the court may enter an order to stay further proceedings on the action in Indiana.

(f) All action authorized by this section must be brought in the Marion County circuit court. [IC 27-9-1-3, as added by Acts 1979, P.L. 255, § 1; P.L.

167-1986, § 1.]

27-9-2-1. Orders of commissioner - Duty to comply - Supervision - Civil liabilities - Judicial enforcement. -- (a) Whenever the commissioner has reasonable cause to believe, and determines, after a hearing held under IC 4-21.5-3, that any domestic insurer has committed or engaged in, or is about to commit or engage in, any act, practice, or transaction that would subject it to a delinquency proceeding under IC 27-9-3-1 or IC 27-9-3-6, the commissioner may make and serve upon the insurer and any other persons involved, any orders reasonably necessary to correct, eliminate, or remedy that conduct, condition, or ground.

(b) If the commissioner has reasonable cause to believe that any domestic insurer is in such condition as to render the continuance of its business

hazardous to the public or to holders of its policies or certificates of insurance, or if that domestic insurer gives its consent, the commissioner shall upon his determination issue an order:

(1) Notifying the insurer of his determination; and

(2) Providing the insurer with a written list of the commissioner's requirements to correct its business practices.

(c) If the commissioner makes a determination to supervise an insurer subject to an order under subsection (a) or (b), the commissioner shall notify the insurer that it is under the supervision of the commissioner. . . .

(h) The commissioner may apply for and the Marion County circuit court may grant, under IC 4-21.5-6, restraining orders as are necessary and proper to

enforce a supervision order. . . . [IC 27-9-2-1, as added by Acts 1979, P.L. 255, § 1; P.L. 7-1987, § 155.]

27-9-2-2. Seizure order - Petition - Duration - Effect on insurer's contracts - Hearing and review - Notice to affected persons. -- (a) The commissioner may file in the Marion County circuit court a petition alleging, with respect to a domestic insurer:

(1) That there exist grounds that justify a court order for a formal delinquency proceeding against the insurer under IC 27-9;

(2) That the interests of policyholders, creditors, or the public will be endangered by delay; and

(3) Other matters the commissioner considers necessary. . . . [IC 27-9-2-2, as

added by Acts 1979, P.L. 255, § 1.]

27-9-3-1. Petition for rehabilitation - Grounds. The commissioner may apply by petition to the Marion County circuit court for an order authorizing him to rehabilitate a domestic insurer or an alien insurer domiciled in Indiana on any one (1) of the following grounds:

> (1) The insurer is in a condition that the further transaction of business would be hazardous, financially, to its policyholders, creditors, or the public. . . .

[IC 27-9-3-1, as added by Acts 1979, P.L. 255, § 1; P.L. 7-1987, § 156.]

27-9-3-2. Order to rehabilitate - Title in rehabilitator - Accountings - Effect on insurer's contracts. (a) An order to rehabilitate the business of a

domestic insurer, or an alien insurer domiciled in Indiana, must:

(1) Appoint the commissioner and his successors in office as the rehabilitator.

(2) Direct the rehabilitator to take possession of the assets of the insurer as soon as possible, and to administer them under the general supervision of the Marion County circuit court.

(b) The filing or recording of the order with the clerk of the Marion County circuit court or recorder of deeds of the county in which the principal business of the company is conducted, or the county in which its principal office or place of business is located, shall impart the same notice as a deed, bill of sale, or other evidence of title duly filed or recorded with that recorder of deeds

would have imparted. The order to rehabilitate the insurer shall by operation of law vest title to all assets of the insurer in the rehabilitator. . . . [IC 27-9-3-2, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-3. Personnel to assist rehabilitator - Expenses - Authority of rehabilitator - Plan - Approval. (a) The commissioner, as rehabilitator, may appoint one (1) or more special deputies, who shall have all the powers and responsibilities of the rehabilitator granted under this section. Also, the commissioner may employ such counsel, clerks, and assistants as he considers necessary.

(b) With the approval of the court, the compensation of the special deputy, counsel, clerks, and assistants and all expenses of taking possession of the

insurer and of conducting the proceedings shall be:

(1) Fixed by the commissioner; and

(2) Paid out of the funds or assets of the insurer.

(c) The persons appointed under this section shall serve at the pleasure of the commissioner.

(d) In the event that the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the commissioner may advance the costs so incurred out of any appropriation for the maintenance of the insurance department. Any amounts so advanced for expenses of administration shall be repaid to the commissioner for the use of the insurance department out of the first available money of the insurer.

(e) The rehabilitator may take such action as he considers necessary or appropriate to reform and revitalize the insurer. The commissioner:

(1) Has all the powers of the directors, officers, and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator;

(2) May direct, manage, hire, and discharge employees subject to any contract rights they may have; and

(3) May deal with the property and business of the insurer.

(f) The rehabilitator may prosecute any action that exists in behalf of the creditors, members, policyholders, or shareholders of the insurer against any director or officer of the insurer or any other person or entity.

(g) If the rehabilitator determines

that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate, he shall prepare a plan to effect those changes.

(h) Upon application of the rehabilitator for approval of the plan, and after such notice and hearings as the Marion County circuit court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. Any plan approved under this section must be, in the judgment of the court, fair and equitable to all parties concerned. If the plan is approved, the rehabilitator shall carry out the plan.

(i) In the case of the life insurer, the plan proposed may include the imposition of liens upon the policies of company, if all rights of shareholders

are first relinquished. A plan for a life insurer may also propose imposition of a moratorium upon loan and cash surrender rights under policies, for such period and to such an extent as may be necessary. [IC 27-9-3-3, as added by Acts 1979, P.L. 255, § 1; P.L. 167-1986, § 3.]

27-9-3-7. Order to liquidate - Title in liquidator - Rights fixed - Judicial declaration of insolvency - Accountings. (a) An order to liquidate the business of a domestic insurer must:

(1) Appoint the commissioner and his successors in office liquidator.

(2) Direct the liquidator as soon as possible to take possession of the assets of the insurer and to administer them under the general supervision of the Marion County

circuit court.

(b) The liquidator shall be vested by operation of law with the title to all of the property, contracts, and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the entry of the final order of liquidation. The filing or recording of the order with the clerk of the circuit court and the recorder of deeds of the county in which its principal office or place [of] business is located, or in the case of real estate with the recorder of deeds of the county where the property is located, shall impart the same notice as a deed, bill of sale, or other evidence of title duly filed or recorded with that recorder of deeds would have imparted.

(c) Upon issuance of the order, the rights and liabilities of any insurer and

of its creditors, policyholders, shareholders, members and all other persons interested in its estate become fixed as of the date of entry of the order of liquidation, except as provided in sections 8 and 35 [27-9-3-8, 27-9-3-35] of this chapter.

(d) An order to liquidate the business of an alien insurer domiciled in Indiana must be in the same terms and have the same legal effect as an order to liquidate a domestic insurer, except that the assets and the business in the United States shall be the only assets and business included in the liquidation.

(e) At the time of petitioning for an order of liquidation, or at any time after petitioning for an order of liquidation, the commissioner, after making appropriate findings of an insurer's insolvency, may petition the

Marion County circuit court for a judicial declaration of that insolvency. After providing for a notice and hearing as the Marion County circuit court considers proper, the court may make the declaration.

(f) An order issued under this section shall require accounting by the liquidator to the Marion County circuit court. Accountings shall be at intervals as the court specifies in its order. [IC 27-9-3-7, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-9. Dissolution by order or operation of law - Powers of liquidator. - (a) The commissioner may petition for an order dissolving the corporate existence of a domestic insurer, or the United States branch of an alien insurer domiciled in Indiana, at the time he applies for a liquidation order. The

Marion County circuit court shall order dissolution of the corporation upon petition by the commissioner upon or after the granting of a liquidation order. If the dissolution has not previously been ordered, the dissolution shall be effected by operation of law upon the discharge of the liquidator if the insurer is insolvent but may be ordered by the court upon the discharge of the liquidator if the insurer is under a liquidation order for some other reason.

(b) The liquidator may do all acts necessary or appropriate for the accomplishment of the liquidation, including the following:

(1) Appoint a special deputy to act for him under this article, and determine a reasonable compensation for that special duty.

(2) Employ employees and

agents, legal counsel, actuaries, accountants, appraisers, consultants, and other personnel as he considers necessary to assist in the liquidation.

(3) Fix the reasonable compensation of employees and agents, legal counsel, actuaries, accountants, appraisers, and consultants with the approval of the court.

(4) Pay reasonable compensation to persons appointed and defray from the funds or assets of the insurer all expenses of taking possession of, conserving, conducting, liquidating, disposing of, or otherwise dealing with the business and property of the insurer.

(5) Hold hearings, subpoena witnesses to compel their attendance,

administer oaths, examine any person under oath, and compel any person to subscribe to his testimony after it has been correctly reduced to writing, and in connection with hearings and the examination of witnesses require the production of any books, papers, records, or other documents which he deems relevant to the inquiry.

(6) Collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose:

(A) Institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against those debts;

(B) Do other acts necessary or expedient to

collect, conserve, or protect its assets or property, including the power to sell, compound, compromise, or assign debts for purposes of collection upon terms and conditions as he considers best; and

(C) Pursue any creditor's remedies available to enforce his claims.

(7) Conduct public and private sales of the property of the insurer.

(8) Use assets of the estate of an insurer under the liquidation order to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under section 40 [IC 27-9-3-40] of this chapter.

(9) Acquire, hypothecate,

encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with, any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable.

(10) Borrow money on the security of the insurer's assets or without security and execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation.

(11) Enter into contracts that are necessary to carry out the order to liquidate, and affirm or disavow any contracts to which the insurer is a party.

(12) Continue to prosecute and to institute in the name of the insurer, or in his own name, all suits and other legal proceedings, in

Indiana or elsewhere, and abandon the prosecution of claims he considers unprofitable to pursue further.

(13) Prosecute any action that may exist in behalf of the creditors, members, policyholders, or shareholders of the insurer against any director or officer of the insurer, or any other person.

(14) Remove all records and property of the insurer to the offices of the commissioner or to some other place as may be convenient for the purposes of efficient and orderly execution of the liquidation.

(15) Deposit in one (1) or more banks in Indiana sums required for meeting current administration expenses and dividend distributions.

(16) Invest all sums not currently needed, unless the court

orders otherwise.

(17) File any necessary documents for record in the office of any recorder of deeds or record office in Indiana or elsewhere where property of the insurer is located.

(18) Assert all defenses available to the insurer as against third persons, including statutes of limitation, statutes of frauds, and the defense of usury.

(19) Exercise and enforce all the rights, remedies, and powers of any creditor, shareholder, policyholder, or member, including any power to avoid any transfer or lien that may be given by the general law and that is not included in sections 14 through 16 [IC 27-9-3-14 -- 27-9-3-16] of this chapter.

(20) Intervene in any proceeding

wherever instituted that might lead to the appointment of a receiver or trustee, and act as the receiver or trustee whenever the appointment is offered.

(21) Enter into agreements with any receiver or commissioner of any other state relating to the rehabilitation, liquidation, conservation, or dissolution of an insurer doing business in both states.

(22) Exercise all powers conferred upon receivers by the laws of Indiana not inconsistent with this article. [IC 27-9-3-9, as added by Acts 1979, P.L. 255, § 1; P.L. 167-1986, § 4.]

27-9-3-10. Notice of liquidation - Notice to file claims - Distribution of assets conclusive. - (a) Unless the Marion County circuit court otherwise

directs, the liquidator shall give notice of the liquidation order as soon as possible by:

(1) First class mail and either by telegram or telephone to the insurance commissioner of each jurisdiction in which the insurer is doing business;

(2) First class mail to any guaranty association or foreign guaranty association that is or may become obligated as a result of the liquidation;

(3) First class mail to all insurance agents of the insurer;

(4) First class mail to all persons known or reasonably expected to have claims against the insurer, including all policyholders, at their last known address as indicated by the records of the insurer;

(5) First class mail to the secretary of state's office; and

(6) Publication in a newspaper of general circulation in the county in which the insurer has its principal place of business and in all other locations the liquidator considers appropriate.

(b) Notice to potential claimants under subsection (a) must require claimants to file with the liquidator their claims, together with proper proof of those claims under section 34 [27-9-3-34] of this chapter, before a date the liquidator specifies in the notice. The liquidator need not require persons claiming cash surrender values or other investment values in life insurance and annuities to file a claim. All claimants must keep the liquidator informed of any changes of address.

(c) If notice is given in accordance with this section, the distribution of assets of the insurer under this chapter shall be conclusive with respect to all claimants, whether or not they received notice [IC 27-9-3-10, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-11. Notice to policyholders by agents - Contents - Report of compliance - Penalty - Waiver of obligation. - (a) Every person who receives notice in the form prescribed in section 10 [IC 27-9-3-10] of this chapter that an insurer whom he represents as an agent is the subject of a liquidation order must, within fifteen (15) days of that notice, give notice of the liquidation order to each policyholder as provided by subsection (b).

(b) The notice must be sent by first class mail to the last address contained

in the agent's records to each policyholder or other person named in any policy issued through that agent by the insurer, if he has a record of the address of the policyholder or other person.

(c) A policy shall be treated as though it were issued through an agent if the agent has a property interest in the expiration of the policy, or if the agent has had in his possession a copy of the declarations of the policy at any time during the life of the policy, except where the ownership of the expiration of the policy has been transferred to another.

(d) The written notice must include:

(1) The name and address of the insurer;

(2) The name and address of the agent; and

(3) Identification of the policy impaired and the nature of the impairment, including termination of coverage as described in section 8 [IC 27-9-3-8] of this chapter.

(e) Notice by a general agent satisfies the notice requirement for any agents under contract to him. Each agent obligated to give notice under this section shall file a report of compliance with the liquidator.

(f) After a hearing under IC 4-21.5-3, an agent failing to give notice or file a report of compliance as required by subsection (e) may be subject to payment of a penalty of not more than one thousand dollars ($1,000) and may have his license suspended.

(g) The liquidator may waive the duties imposed by this section if he determines that other notice to the

policyholders of the insurer under liquidation is adequate. [IC 27-9-3-11, as added by Acts 1979, P.L. 255, § 1; P.L. 7-1987, § 157.]

27-9-3-12. Suits barred by appointment of liquidator - Full faith and credit to actions authorized by similar foreign provisions - Intervention in foreign action - Limitation periods - Standing of guaranty associations. - (a) Upon issuance of an order appointing a liquidator of a domestic insurer or of an alien insurer domiciled in Indiana, an action at law or equity may not be brought against the insurer or liquidator, whether in Indiana or elsewhere, nor shall any existing actions be maintained or further presented after issuance of an order.

(b) The courts of Indiana shall give full faith and credit to injunctions

against the liquidator or the company or the continuation of existing actions against the liquidator or the company, when those injunctions are included in an order to liquidate an insurer issued under similar provisions in other states.

(c) Whenever in the liquidator's judgment, protection of the estate of the insurer necessitates intervention in an action against the insurer that is pending outside Indiana, the liquidator may intervene in the action. The liquidator may defend any action in which he intervenes under this section at the expense of the estate of the insurer.

(d) Within two (2) years after an order for liquidation (or a time in addition to two [2] years as aplicable law may permit) the liquidator may institute an action or proceeding on behalf of the estate of the insurer upon

any cause of action against which the period of limitation fixed by applicable law has not expired at the time of the filing of the petition upon which the order is entered.

(e) Where, by an agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in the proceeding or by applicable law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case the period had not expired at the date of the filing of the petition[,] The liquidator may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the insurer,

within a period of one hundred eighty [180] days after the entry of an order for liquidation, or within such further period as is shown to the satisfaction of the Marion County circuit court not to be unfairly prejudicial to the other party.

(f) A statute of limitations or defense of laches shall not run with respect to any action against an insurer between the filing of a petition for liquidation against an insurer and the denial of the petition. Any action against the insurer that might have been commenced when the petition was filed may not be commenced for at least sixty [60] days after the petition is denied.

(g) Any guaranty association or foreign guaranty association has standing to appear in any court proceeding concerning the liquidation of an insurer if that association is or may become

liable to act as a result of the liquidation. [IC 27-9-3-12, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-14. Fraudulent transfers and obligations - Avoidance. - (a) Every transfer made, or suffered, and every obligation incurred by an insurer within one [1] year before the filing of a successful petition for rehabilitation or liquidation under IC 27-9 is fraudulent as to then existing and future creditors if made or incurred without fair consideration, or with actual intent to hinder, delay, or defraud either existing or future creditors.

(b) A transfer made or an obligation incurred by an insurer ordered to be rehabilitated or liquidated under IC 27-9, which is fraudulent under this section, may be avoided by the receiver, except:

(1) As to a person who in good faith is a purchaser, lienor, or obligee for a present fair equivalent value; and

(2) That any purchaser, lienor, or obligee, who in good faith has given a consideration less than fair for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

The court may, on due notice, order any transfer or obligation to be preserved for the benefit of the estate, and in that event, the receiver shall succeed to and may enforce the rights of the purchaser, lienor, or obligee.

(c) A transfer of property, other than real property, is made or suffered when it becomes so far perfected that no subsequent lien obtainable by legal or

equitable proceedings on a simple contract could become superior to the rights of the transferee under section 18 [27-9-3-18] of this chapter.

(d) A transfer of real property is made or suffered when it becomes so far perfected that no subsequent bona fide purchaser from the insurer could obtain rights superior to the rights of the transferee.

(e) A transfer that creates an equitable lien is not perfected if there are available means by which a legal lien could be created.

(f) Any transfer not perfected before the filing of a petition for liquidation shall be treated as if it were made immediately before the filing of the successful petition.

(g) The provisions of subsections (b) through (f) apply whether or not

there are or were creditors who might have obtained any liens or persons who might have become bona fide purchasers.

(h) Any transaction of the insurer with a reinsurer is fraudulent and may be avoided by the receiver under section 13 [27-9-3-13] of this chapter if:

(1) The transaction consists of the termination, adjustment, or settlement of a reinsurance contract in which the reinsurer is released from any part of its duty to pay the originally specified share of losses that had occurred before the time of the transaction, unless the reinsurer gives a present fair equivalent value for the release; and

(2) Any part of the transaction took place within one [1] year before the date of filing of the petition through which the receivership was

commenced. [IC 27-9-3-14, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-15. Transfers made after filing of petitions -- Negotiability not impaired. - (a) After a petition for rehabilitation or liquidation has been filed, a transfer of any of the real property of the insurer made to a person acting in good faith shall be valid against the receiver if made for a present fair equivalent value, or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid for that real property, for which amount the transferee shall have a lien on the property so transferred. The commencement of a proceeding in rehabilitation or liquidation shall be constructive notice upon the recording of a copy of the petition for or order of rehabilitation

or liquidation with the recorder of deeds in the county where any real property in question is located. The exercise by a court of the United States or any state with jurisdiction to authorize or effect a judicial sale of real property of the insurer within any county in any state shall not be impaired by the pendency of a proceeding, unless the copy is recorded in the county before the consummation of the judicial sale.

(b) After a petition for rehabilitation or liquidation has been filed and before either the [receiver] takes possession of the property of the insurer or an order of rehabilitation or liquidation is granted:

(1) A transfer of any of the property of the insurer, other than real property, made to a person acting in good faith shall be valid

against the receiver if made for a present fair equivalent value, or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid for that real property, for which amount the transferee shall have a lien on the property so transferred;

(2) A person indebted to the insurer or holding property of the insurer may, if acting in good faith, pay the indebtedness or deliver the property, or any part of the property, to the insurer or upon his order, with the same effect as if the petition were not pending;

(3) A person having actual knowledge of the pending rehabilitation or liquidation shall be considered not to act in good

faith; and

(4) A person asserting the validity of a transfer under this section has the burden of proof.

Except as elsewhere provided in this section, a transfer by or on behalf of the insurer after the date of the petition for liquidation by any person other than the liquidator is not valid against the liquidator.

(c) Nothing in IC 27-9 shall be considered to impair the negotiability of currency or negotiable instruments. [IC 27-9-3-15, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-16. Preferences -- Avoidance. - (a) A preference is a transfer of any of the property of an insurer to or for the benefit of a creditor, for or on account of an antecedent debt, made or suffered by the

insurer within one [1] year before the filing of a successful petition for liquidation under IC 27-9, the effect of which transfer may be to enable the creditor to obtain a greater percentage of this debt than another creditor of the same class would receive. If a liquidation order is entered while the insurer is already subject to a rehabilitation order, then that transfer shall be considered a preference if made or suffered within one [1] year before the filing of the successful petition for rehabilitation, or within two [2] years before the filing of the successful petition for liquidation, whichever time is shorter.

(b) A preference may be avoided by the liquidator if:

(1) The insurer was insolvent at the time of the transfer;

(2) The transfer was made within four [4] months before the filing of the petition;

(3) The creditor receiving it or to be benefited by it or his agent acting with reference to it had, at the time when the transfer was made, reasonable cause to believe that the insurer was insolvent or was about to become insolvent; or

(4) The creditor receiving it was an officer, or any employee or attorney or other person who was in fact in a position of comparable influence in the insurer to an officer whether or not he held such a position, or any shareholder holding directly or indirectly more than five per centum [5%] of any class of any equity security issued by the insurer, or any other person, firm,

corporation, association, or aggregation of persons with whom the insurer did not deal at arm's length.

(c) Where the preference is voidable, the liquidator may recover the property or, if it has been converted, its value from any person who has received or converted the property, except where a bona fide purchaser or lienor has given less than fair equivalent value, he shall have a lien upon the property to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order the lien or title to be preserved for the benefit of the estate, in which event the lien or title shall pass to the liquidator. [IC 27-9-3-16, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-17. Time transfer made or suffered. - (a) A transfer of property other than real property shall be considered to be made or suffered when it becomes so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee.

(b) A transfer of real property shall be considered to be made or suffered when it becomes so far perfected that no subsequent bona fide purchaser from the insurer could obtain rights superior to the rights of the transferee.

(c) A transfer that creates an equitable lien shall not be considered to be perfected if there are available means by which a legal lien could be created.

(d) A transfer not perfected before the filing of a petition for liquidation

shall be considered to be made immediately before the filing of the successful petition.

(e) This section applies whether or not there are or were creditors who might have obtained liens or persons who might have become bona fide purchasers. [IC 27-9-3-17, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-18. Meaning of terms relative to time determination. - (a) A lien obtainable by legal or equitable proceedings upon a simple contract is one arising in the ordinary course of those proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy. It does not include liens that under applicable law are given

a special priority over other liens that are prior in time.

(b) A lien obtainable by legal or equitable proceedings could become superior to the rights of a transferee, or a purchaser could obtain rights superior to the rights of a transferee within the meaning of section 17 [27-9-3-17] of this chapter, if those consequences would follow only from the lien or purchase itself, or from the lien or purchase followed by any step wholly within the control of the respective lienholder or purchaser, with or without the aid of ministerial action by public officials. A lien could not, however, become superior and a purchase could not create superior rights for the purpose of section 17 of this chapter through any acts after obtaining a lien or after a purchase that requires the agreement or

concurrence of any third party or which requires any further judicial action or ruling. [IC 27-9-3-18, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-19. Transfers for new and contemporaneous consideration. -- A transfer of property for or on account of a new and contemporaneous consideration that is considered under section 17 [27-9-3-17] of this chapter to be made or suffered after the transfer because of delay in perfecting it does not become a transfer for or on account of an antecedent debt if any acts required by the applicable law to be performed in order to perfect the transfer as against liens or bona fide purchasers' rights are performed within twenty-one [21] days or any period expressly allowed by the law, whichever is less. A transfer to secure a future loan or a transfer that becomes

security for a future loan, has the same effect as a transfer for or on account of a new and contemporaneous consideration [IC 27-9-3-19, as added by Acts 1979, P.L. 255 § 1.]

27-9-3-20. Indemnifying transfers or liens. -- If any lien that is voidable under section 16(b) [27-9-3-16(b)] of this chapter has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any property of an insurer before the filing of a petition under IC 27-9 that results in a liquidation order, the indemnifying transfer or lien shall also be considered voidable [IC 27-9-3-20, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-21. Discharge of voidable liens or preservation for benefit of

estate. -- The property affected by any lien considered voidable under sections 16 and 20 [27-9-3-16, 27-9-3-20] of this chapter shall be discharged from that lien, and that property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the liquidator, except that the court may on due notice order any lien to be preserved for the benefit of the estate and the court may direct that the conveyance be executed as may be proper or adequate to evidence the title of the liquidator. [IC 27-9-3-21, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-22. Summary jurisdiction - Notice - Disposition of indemnifying property or lien. -- The Marion County circuit court has summary jurisdiction of any proceeding by the liquidator to hear and determine the rights of any parties

under this chapter. Reasonable notice of any hearing in the proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, upon application of any party in interest, shall in the same proceeding ascertain the value of the property or lien, and if the value is less than the amount for which the property is indemnity or than the amount of the lien, the transferee or lienholder may elect to retain the property or lien upon payment of its value, as ascertained by the court, to the liquidator, within reasonable times as the court shall fix. [IC 27-9-3-22, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-23. Discharge of surety under releasing bond. -- The liability of a surety under a releasing bond or other like obligation shall be discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and avoided by the liquidator, or where the property is retained under section 22 [27-9-3-22] of this chapter to the extent of the amount paid to the liquidator. [IC 27-9-3-23, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-24. Set-off against preference. -- If a creditor has been preferred, and afterward in good faith gives the insurer further credit without security of any kind for property that becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition may be

set off against the preference that would otherwise be recoverable from him. [IC 27-9-3-24, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-25. Payments or transfers to attorneys. -- If an insurer shall, directly or indirectly:

(1) Within four [4] months before the filing of a successful petition for liquidation under IC 27-9; or

(2) At any time in contemplation of a proceeding to liquidate it;

pay money or transfer property to an attorney for services, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the liquidator and shall be held valid only to the extent of a reasonable amount to be determined by the

court. The excess may be recovered by the liquidator for the benefit of the estate. However, where the attorney is in a position of influence in the insurer or an affiliate of the insurer payment of any money or the transfer of any property to the attorney for services is governed by section 16(b)(4) [27-9-3-16(b)(4)] of this chapter. [IC 27-9-3-25, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-26. Personal liability for preferences. - (a) Every officer, manager, employee, shareholder, member, subscriber, attorney, or any other person acting on behalf of the insurer who knowingly participates in giving any preference when he has reasonable cause to believe the insurer is or is about to become insolvent at the time of the preference is personally liable to the liquidator for the amount of the

preference. If the transfer was made within four [4] months before the date of filing a successful petition for liquidation it may be presumed that the person knew of the pending insolvency.

(b) Every person receiving any property from the insurer (or the benefit of any property) as a preference voidable under section 16(a) [27-9-3-16(a)] of this chapter is personally liable for that property and is bound to account to the liquidator.

(c) Nothing in this [section] shall prejudice any other claim by the liquidator against any person. [IC 27-9-3-26, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-27. Conditions for allowance of claims of creditor receiving voidable transfer - Excused late filing. - (a) Claims of a creditor who has received or

acquired a preference, lien, conveyance, transfer, assignment, or encumbrance, voidable under IC 27-9, shall not be allowed unless he surrenders the preference, lien, conveyance, transfer, assignment, or encumbrance. If the avoidance is effected by a proceeding in which a final judgment has been entered, the claim shall not be allowed unless the money is paid or the property is delivered to the liquidator within thirty [30] days from the date of entering of the final judgment, except that the Marion County circuit court may allow further time if there is an appeal or other continuation of the proceeding.

(b) A claim allowable under subsection (a) by reason of the avoidance, whether voluntary or involuntary, or a preference, lien, conveyance, transfer, assignment, or

encumbrance, may be filed as an excused late filing under section 33 [27-9-3-33] of this chapter if filed within thirty [30] days from the date of the avoidance (or within the further time allowed by the court under subsection (a)). [IC 27-9-3-27, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-34. Proof of claim - Contents - Form - Additional information and proceedings - Evidence. - (a) Proof of a claim shall consist of a statement signed by the claimant that includes all of the following that are applicable:

(1) The paticulars of the claim including the consideration given for it.

(2) The identity and amount of the security on the claim.

(3) The payments made on the debt, if any.

(4) That the sum claimed is justly owing and that there is no setoff, counterlcaim, or defense to the claim.

(5) Any right of priority of payment or other specific right asserted by the claimants.

(6) A copy of written instrument that is the foundation of the claim.

(7) The name and address of the claimant and the attorney who represents him, if any.

(b) A claim need not be considered or allowed if it does not contain all the information in subsection (a) that is applicable. The liquidator may require that a prescribed form be used, and may require that other information and documents be included.

(c) At any time, the liquidator may:

(1) Request the claimant to present information or evidence supplementary to that required by subsection (a);

(2) Take testimony under oath;

(3) Require production of affidavits or depositions; or

(4) Obtain additional information or evidence necessary.

(d) The following do not need to be considered as evidence of liability or the measure of damages:

(1) A judgment or order against an insured or the insurer entered after the date of filing a successful petition for liquidation.

(2) A judgment or order against an insured or the insurer entered at anytime by default or by collusion.

(3) A judgment or order against an insured or the insurer entered not

more than four [4] months before the filing of the petition.

(e) All claims of a guaranty association or foreign guaranty association must be in a form and contain substantiation as may be agreed to by the association and liquidator. [IC 27-9-3-34, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-35. Claims contingent or not yet due - Employee claims. - (a) The claim of a third party that is contingent only on his first obtaining a judgment against the insured must be considered and allowed as if there were no contingency.

(b) If a claim is filed in accordance with section 33 [27-9-3-33] of this chapter, it may be allowed even if contingent. A contingent claim may be allowed and may participate in all

distributions declared after it is filed to the extent that it does not prejudice the orderly administration of the liquidation.

(c) Claims that are due except for the passage of time must be treated as absolute claims are treated, except that the claims may be discounted at the legal rate of interest.

(d) Claims made under employment contracts by directors or principal officers (or persons performing similar functions or having similar powers) are limited to payment for services provided before the issuance of any order of rehabilitation or liquidation under section 2 or 7 [27-9-3-2, 27-9-3-7] of this chapter. [IC 27-9-3-35, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-36. Claims of insured or third party asserting cause of action

against insured. - (a) Whenever a third party asserts a cause of action against an insured of an insurer in liquidation, the third party may file a claim with the liquidator.

(b) Whether or not the third party files a claim, the insured may file a claim on his own behalf in the liquidation. If the insured fails to file a claim by the date for filing claims specified in the order of liquidation, or within sixty [60] days after mailing of the notice required by section 10 [25-9-3-10] of this chapter, whichever is later, the insured is an unexcused late filer.

(c) The liquidator shall make his recommendations to the Marion County circuit court under section 40 [25-9-3-40] of this chapter, for the allowance of an insured's claim under

subsection (b), after consideration of:

(1) The probable outcome of any pending action against the insured on which the claim is based;

(2) The probable damages recoverable in the action; and

(3) The probable costs and expenses of defense.

(d) After allowance by the court, the liquidator shall withhold any dividends payable on the claim, pending the outcome of litigation and negotiation with the insured. Whenever it seems appropriate, the liquidator shall reconsider the claim on the basis of additional information and amend his recommendations to the Marion County circuit court. The insured shall be afforded the same notice and opportunity to be heard on all changes in the recommendation as in its initial

determination. The Marion County circuit court may amend its allowance as it thinks appropriate.

(e) As claims against the insured are settled or barred, the insured shall be paid from the amount withheld the same percentage dividend as was paid on other claims of like property, based on the lesser of:

(1) The amount actually recovered from the insured by action or paid by agreement, plus the reasonable costs and expenses of defense; or

(2) The amount allowed on the claims by the court.

(f) After all claims are settled or barred, any sum remaining from the amount withheld shall revert to the undistributed assets of the insurer. Delay in final payment under this

subsection is not a ground for unreasonable delay of final distribution and discharge of the liquidator.

(g) If several claims founded upon one [1] policy are filed, whether by third parties or as claims by the insured under this section, and the aggregate allowed amount of the claims to which the same limit of liability in the policy is applicable exceeds that limit, each claim as allowed shall be reduced in the same proportion so that the total equals the policy limit. Claims by the insured shall be evaluated as required in subsections (c) through (f). If any insured's claim is subsequently reduced under subsection (c) through (f) the amount freed shall be apportioned ratably among the claims that have been reduced under this subsection.

(h) A claim may not be presented

under this section if it is or may be covered by any guaranty association or foreign guaranty association. [IC 27-9-3-26, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-37. Notice of denial of claim - Filing of objections - Notice and hearing. - (a) When a claim is denied in whole or in part by the liquidator, written notice of the determination must be given to the claimant or his attorney by first class mail at the address shown in the proof of claim. Within sixty [60] days from the mailing of the notice, the claimant may file his objections with the liquidator. If no filing is made, the claimant may not further object to the determination.

(b) Whenever objections are filed with the liquidator and the liquidator does not alter his denial of the claim as

a result of the objections, the liquidator shall ask the Marion County circuit court for a hearing as soon as practicable and give notice of the hearing by first class mail to the claimant or his attorney and to any other persons directly affected, not less than ten [10] nor more [than] thirty [30] days before the date of the hearing. The matter may be heard by the court or by a court appointed referee who shall submit findings of fact along with his recommendation. [IC 27-9-3-37, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-38. Rights of person securing claim against insurer. -- Whenever a creditor whose claim against an insurer is secured, in whole or in part, by the undertaking of another person, fails to prove and file that claim, the other person may do so in the creditor's name,

and shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by the other person in the creditor's name, to the extent that he discharges the undertaking. However, in the absence of an agreement with the creditor to the contrary, the other person is not entitled to any distribution until the amount paid to the creditor on the undertaking plus the distributions paid on the claim from the insurer's estate to the creditor equals the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him in trust for the other person. As used in this section, the term "other person" is not intended to apply to a guaranty association or foreign guaranty association. [IC 27-9-3-38, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-39. Value of security held by secured creditor - Treatment of deficiency. - (a) The value of any security held by a secured creditor shall be determined in one [1] of the following ways, as the Marion County circuit court may direct:

(1) By converting the security into money according to the terms of the agreement under which the security was delivered to the creditors.

(2) By agreement, arbitration, compromise, or litigation between the creditor and the liquidator.

(b) The valuation determination shall be under the supervision and control of the Marion County circuit court with due regard for the recommendation of the liquidator. The amount determined shall be credited upon

the secured claim, and any deficiency shall be treated as an unsecured claim. If the claimant surrenders his security to the liquidator, the entire claim shall be allowed as if unsecured. [IC 27-9-3-39, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-40. Order of distribution of claims. -- The priority of distribution of claims from the insurer's estate must be in accordance with the order in which each class of claims is set forth in this section. Evey claim in each class must be paid in full (or adequate funds retained for payment) before the members of the next class receive any payment. Subclasses may not be established within any class. The order of distribution of claims shall be:

(1) Class 1. The costs and expenses of administration, including:

(A) The actual and necessary costs of preserving or recovering the assets of the insurer.

(B) Compensation for all services rendered in the liquidation.

(C) Any necessary filing fees.

(D) The fees and mileage payable to witnesses.

(E) Reasonable attorney's fees.

(F) The reasonable expenses of a guaranty association or foreign guaranty association in handling claims.

(2) Class 2. Debts due to employees for services performed to the extent that they do not exceed one thousand dollars ($1,000) and

represent payment for services performed within one [1] year before the filing of the petition for liquidation. Officers and directors are not entitled to the benefit of this priority. This priority is in place of any other similar priority that may be authorized by law as to wages or compensation of employees.

(3) Class 3. All claims under policies for losses incurred, including third party claims, all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property which are not under policies, and all claims of a guaranty association or foreign guaranty association. All claims under life insurance and annuity policies, whether for death proceeds,

annuity proceeds, or investment values shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in the class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. Payment by an employer to his employee may not be treated as gratuity.

(4) Class 4. Claims under nonassessable policies for unearned premium or other premium refunds and claims of general creditors.

(5) Class 5. Claims of the federal government or any state or

local government. Claims, including those of any governmental body for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of these claims shall be postponed to the class of claims under subdivision (8).

(6) Class 6. Claims filed late or any other claims other than claims under subdivisions (7) and (8).

(7) Class 7. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Payments to members of domestic mutual insurance

companies shall be limited in accordance with law.

(8) Class 8. The claims of shareholders or other owners. [IC 27-9-3-40, as added by Acts 1979, P.L. 255, § 1.]

27-9-3-41. Review and negotiation of claims by liquidator - Report to court - Approval, disapproval or modification. - (a) The liquidator shall review all claims duly filed in the liquidation and shall make further investigation as he considers necessary. He may compound, compromise, or in any other manner negotiate the amount for which claims will be recommended to the Marion County circuit court except where the liquidator is required by law to accept claims as settled by any person or organization, including any guaranty association or foreign guaranty association. Unresolved

disputes shall be determined under section 37 [27-9-3-37] of this chapter. As soon as practicable, the liquidator shall present to the Marion County circuit court a report of the claims against the insurer with his recommendations. The report must include the name and address of each claimant and the amount of the claim finally recommended, if any. If the insurer has issued annuities or life insurance policies, the liquidator shall report the persons to whom, according to the records of the insurer, amounts are owed as cash surrender values or other investment value and the amounts owed.

(b) The Marion County curcuit court may approve, disapprove, or modify the report on claims by the liquidator. Reports that are not modified by the court within a period of sixty [60] days

following submission by the liquidator shall be treated by the liquidator as allowed claims, subject to later modification or to rulings made by the court under [to] section 37 of this chapter. A claim under a policy of insurance may not be allowed for an amount in excess of the applicable policy limits. [IC 27-9-3-41, as added by Acts 1979, P.L. 255, § 1.]

A-123

IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT

No. 49A02-8903-CV-105

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Appellant (Petitioner Below),

vs.

AMERICAN UNDERWRITERS GROUP, INC.,

Appellee (Respondent Below),

Appeal from the
Marion Circuit Court
The Honorable Judith S. Proffitt,
Special Judge
49C01-8804-MI-1016-A

APPELLEE'S PETITION FOR REHEARING

Appellee-Respondent American Underwriters Group, Inc., ("AUG") hereby petitions this Court to grant a rehearing in this cause and respectfully states

that the Opinion of this Court filed herein on April 10, 1990, is erroneous in each of the following particulars:

* * * *

IV.

* * * *

C.

The Opinion is plainly and fundamentally erroneous in construing IC 27-9 so as to encompass attorneys-in-fact for subscribers of a reciprocal. IC 27-9 as so construed impinges on the federal Bankruptcy Code and is thus rendered unconstitutional and unenforceable under the Supremacy Clause of Article VI of the United States Constitution.

D.

The Opinion is contrary to and contravenes the ruling precedent of the Supreme Court in Ettinger v. Studevant (1942), 219 Ind. 406, 38 N.E.2d 1000,

1003, which held that if the legislative intent of a statute can be ascertained, the courts must give effect to that intention but only to the extent permitted by established principles of statutory construction within constitutional limitations and the prior opinion of the Court of Appeals in Willis v. State (1986), Ind.App., 492 N.E.2d 45, 47, which held that in matters of statutory construction, courts will adopt the interpretation that renders a statute constitutional and fully implements its provisions.

* * * *

WHEREFORE Appellee-Respondent prays that its Petition for Rehearing be granted, that the Opinion and decision of this Court be vacated and that the judgment of the Marion Circuit Court be affirmed.

A-126

IN THE

SUPREME COURT OF INDIANA

No. _____

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Appellant (Petitioner Below),

vs.

AMERICAN UNDERWRITERS GROUP, INC.,

Appellee (Respondent Below).

COURT OF APPEALS
NO. 49A02-8903-CV-105

Appeal from the
Marion Circuit Court
The Honorable Judith S. Proffitt,
Special Judge

APPELLEE'S PETITION
TO TRANSFER

Appellee-Respondent American Underwriters Group, Inc., ("AUG"), by counsel, respectfully petitions this

Court for transfer of this cause and in support of its petition states:

1. The Court of Appeals (Second District) decided this cause with a written Opinion filed on April 10, 1990. The Opinion is published at 552 N.E.2d 50.

2. The Opinion of the Court of Appeals was against AUG.

3. A petition for rehearing was timely filed with the Court of Appeals on April 30, 1990, and rehearing was denied on June 5, 1990, without opinion.

4. The Opinion and decision of the Court of Appeals are in error in the following particulars:

* * * *

IV.

* * * *

C.

The Opinion is plainly and fundamentally erroneous in construing IC

27-9 so as to encompass attorneys-in-fact for subscribers of a reciprocal. IC 27-9 as so construed impinges on the federal Bankruptcy Code and is thus rendered unconstitutional and unenforceable under the Supremacy Clause of Article VI of the United States Constitution.

D.

The Opinion is contrary to and contravenes the ruling precedent of the Supreme Court in Ettinger v. Studevant (1942), 219 Ind. 406, 38 N.E.2d 1000, 1003, which held that if the legislative intent of a statute can be ascertained, the courts must give effect to that intention but only to the extent permitted by established principles of statutory construction within constitutional limitations and the prior opinion of the Court of Appeals in Willis v. State (1986), Ind.App., 492

N.E.2d 45, 47, which held that in matters of statutory construction, courts will adopt the interpretation that renders a statute constitutional and fully implements its provisions.

* * * *

WHEREFORE Appellee-Respondent American Underwriters Group, Inc., prays that its petition to transfer be granted, that the Opinion and decision of the Court of Appeals be vacated, and that the judgment of the Marion Circuit Court be affirmed.

Supreme Court, U.S.
FILED
APR 5 1991
OFFICE OF THE CLERK

(2)

No. 90-1312

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AMERICAN UNDERWRITERS GROUP, INC.,

Petitioner,

v.

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Indiana Court of Appeals considered and decided a federal question?

II. Whether American Underwriters Group, Inc., is an insurance company within the meaning of 11 U.S.C. § 109(b) and, therefore, excluded from federal bankruptcy relief?

III. Whether Indiana Code § 27-9 is preempted by the Bankruptcy Code?

IV. Whether a substantial federal question has been raised?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the judgment of the Indiana Court of Appeals. Harry E. Eakin, as the Insurance Commissioner of the Department of Insurance of the State of Indiana, at the time that the Petition for Rehabilitation of American Underwriter's Group was filed and who has since been succeeded by John J. Dillon, III, ("Commissioner"), has no parent companies or subsidiaries to be listed pursuant to Rule 29.1.

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Respondent, Harry E. Eakin, as the Insurance Commissioner of the Department of Insurance of the State of Indiana, at the time that the Petition for Rehabilitation of American Underwriter's Group was originally filed, ("Commissioner") respectfully prays that the Petition for Writ of Certiorari be denied.

JURISDICTION

American Underwriters Group, Inc., ("AUG") has sought to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). As will be set forth in detail below, this Court lacks jurisdiction to review this matter. The Indiana Court of Appeals did not decide a federal question. The question now raised by AUG was not properly raised by AUG before the Indiana trial court or the

Indiana Court of Appeals. By AUG's own admission, this question was not raised until twenty (20) days after the Indiana Court of Appeals' decision was rendered when AUG filed a petition for rehearing. The raising of a federal question for the first time in a petition for rehearing is insufficient. This Court is without jurisdiction of this matter and it must be dismissed.

STATEMENT OF THE CASE

AUG is the attorney-in-fact for AIE, an Indiana interinsurance exchange organized pursuant to I.C. § 27-6-6-1 et seq. Pursuant to Indiana's interinsurance statutes, the policyholders of AIE, called "subscribers", are authorized to exchange reciprocal or interinsurance contracts with each other or others. These contracts are executed by an

attorney, in this instance AUG, who is authorized by and acts on behalf of the subscribers. I.C. § 27-6-6-2.

The relationship between AUG and AIE's subscribers is set forth in a document entitled "Power of Attorney and Subscriber's Agreement", a copy of which is filed with the Department of Insurance and attached to each policy issued to AIE subscribers. Pursuant to this Power of Attorney, AUG is authorized as follows:

> Subscriber authorizes Attorney-in-Fact, on Subscriber's behalf, to effect, modify and terminate contracts containing such terms as Attorney-in-Fact may deem suitable to provide any and all forms of insurance; to collect all monies due; to give, waive, or receive all notices and proof of losses; to settle all losses and claims under insurance contracts herein authorized; to cede and assume reinsurance; to accept and authorize others to accept service of process and appear in behalf of Subscriber in any suits, actions or proceedings, and to bring, prosecute, defend or otherwise

> settle suits, actions or proceedings; to perform every act not herein specified that the Subscriber could individually perform in relation to any contract herein authorized, appropriate to its proper and lawful execution and performance; . . .
>
> * * *
>
> Subscriber authorizes the Attorney-in-Fact to pay out of the funds of Subscriber the cost of reinsurance, collection expense, investment expenses, losses, damages, judgments, court costs, legal expenses, loss adjustment expenses, license fees, taxes, inspection expenses, audits, examinations, rating bureaus, insurance trade and service organizations, bonds as required herein, brokerage and agency expenses and commissions.

All premiums collected by AUG on policies issued by AIE were deposited in an account maintained under the name of AUG as attorney-in-fact for AIE. The principal signatories on the account, with the possible exception of one, were employees of AUG.

From time to time an exchange of assets was made between AUG and AIE. In 1980, AUG as attorney-in-fact for AIE loaned itself $1,600,000 of AIE funds for the purpose of purchasing a subsidiary of AIE. The loan was subsequently repaid by a donation of stock of two insurance subsidiaries owned by AUG.

The relationship between AUG and AIE is further described in various documents authored by AUG. AUG was incorporated in 1964 and its primary purpose, as set forth in its 1971 Amended Articles of Incorporation, is as follows:

> To act as Attorney-in-Fact for a reciprocal insurer and to exchange, negotiate, solicit and execute reciprocal or interinsurance contracts among individuals, partnerships, associations and corporations, as Subscribers . . . and in general to do all other things necessary, incidental and convenient to conducting an insurance business as Attorney-in-Fact for a reciprocal insurer.

As a corporation regulated by the Securities and Exchange Commission, AUG files a Form 10-K on an annual basis. In its 1987 Form 10-K, AUG stated as follows regarding its relationship to AIE:

> Although the Company does not own the Exchange, its relationship thereto may be regarded as perpetual, or until dissolution, inasmuch as the Exchange exists by reason of its creation, financing, management and maintenance by the Company. The Exchange has no capacity to act except through the Company as its Attorney-in-Fact.
>
> * * *
>
> Due to the Company's dependence on the viability of Exchange and because of the close relationship and transactions with the Exchange, financial statements of the Exchange are also presented in this report.

The power of attorney and subscribers agreement authorizes AUG to deduct for itself up to 15% of all monies received or due to AIE as a fee for its services.

From time to time, AUG overpaid itself the attorney-in-fact fee. As of April 30, 1987 the overpayment amounted to $443,000. As of December 31, 1987 the overpayment amounted to $91,000.

In AUG's 1986 annual report, AUG stated with regard to the impact of regulation by the Department:

> Although it is not possible to predict the effects of the agreed order of supervision on the Exchange or the Company, it is probable that, unless the Exchange is able to substantially increase its surplus or obtain quota-share reinsurance on favorable terms, or a combination thereof, the Indiana Department of Insurance may restrict all writings of new and renewal business of the Exchange. This restriction would have the effect of substantially eliminating the attorney-in-fact fees from the Exchange to the Company which are largely based on premiums written by the Exchange, as described below. If the Indiana Department of Insurance follows this course of action, it could ultimately lead to the runoff of the business-in-force of the

> Exchange and the liquidation of both the Company and the Exchange.

The Department issued a Certificate of Authority to AUG authorizing AUG to make contracts of insurance. As set forth by statute:

> No certificate of authority shall be issued under this section unless and until the subscribers and the attorney shall have complied with the same character and fitness qualifications, plan of operation, and standards for officers and directors as is required of stock and mutual insurance companies under this title."

I.C. § 27-6-6-9. The inter-insurance certificate of authority issued by the Department states in part that AUG:

> . . . is hereby authorized and empowered to issue and exchange contracts of inter-insurance under the name and designation of American Inter-Insurance Exchange at Indianapolis in the State of Indiana insuring the members of such exchange in this state against loss . . . for the year ending perpetual unless suspended or revoked.

AUG's obligations and duties to the subscribers of AIE are regulated by statute. Pursuant to I.C. § 27-6-6-3, the subscribers, through AUG, are required to file with the Department of Insurance a declaration verified by the oath of AUG setting forth that there is in the possession of AUG and available for the payment of losses, assets conforming to the requirements of Section 6 of this Act. Section 6 provides that if at any time the assets shall be less than required, "the subscribers or their attorney for them shall make up the deficiency within 30 days after notice from the department of insurance. . . ."

From December 12, 1973, to June 22, 1979, AUG injected $8 million into AIE evidenced by the guarantee fund certificates issued by AUG, each of which provides:

> The principle sum represented by this guarantee fund certificate and the interest thereon shall be repaid only out of the surplus, earnings or profits of the exchange with the approval of the Department of Insurance of the State of Indiana whenever in its judgment the financial condition of the exchange shall warrant, but such approval shall not be withheld if after such repayment shall be made, the exchange shall have and be in possession of a surplus as regards policyholders equal to ten percent or more of the gross annual premium of these subscribers at the exchange.

Among other duties, AUG is authorized and required to maintain all financial information with regard to the affairs of AIE. Pursuant to I.C. § 27-6-6-7, AUG is required to annually report to the Department, under oath, as to the financial condition of the office where the contracts are issued and shall further report as required. The annual statement for year-end 1987 was filed by AUG with the Department of Insurance.

The truth of the statements contained therein were sworn to by the president, secretary and treasurer of AUG as "officers of the said insurer."

I.C. § 27-6-6-7 provides that, "[t]he business affairs, records, and assets of any such organization shall be subject to examination by the insurance department at any reasonable time, and such examination shall be at the expense of the organization examined." Among the documents submitted by AUG to the Department of Insurance over the last ten years were registration statements required of insurance holding companies, which contain information about the entity controlling the insurance, along with separate biographical affidavits filed by AUG's officers and directors.

I.C. § 27-6-6-11 provides that the attorney's failure or refusal to comply with any of the provisions of this chapter shall result in the refusal, suspension or revocation of the Certificate of Authority by the Department after notice and opportunity for hearing has been given so that the attorney may appear and show cause why such action should not be taken.

I.C. § 27-6-6-15 authorizes AUG on behalf of the subscribers to borrow or assume a loan or advance for certain purposes, and further sets forth the conditions under which the loan may be repaid. The Department may withhold its approval of any repayment "whenever in its judgment the financial condition of the attorney for the subscribers at such exchange shall warrant." Finally, I.C.

§ 27-6-7-1 provides that AIE may only sue or be sued through its Attorney-in-Fact, AUG.

On April 6, 1988, the Commissioner filed a Verified Petition for Order of Rehabilitation of AIE. On that same day, AIE was placed into rehabilitation, after consent was given by the Board of Directors of AUG, pursuant to I.C. § 27-9-3-1, which provides that the Commissioner may request an order authorizing him to rehabilitate a domestic insurer on the grounds that:

> (12) The board of directors or the holders of a majority of the shares entitled to vote, or a majority of those individuals entitled to the control of those entities, request or consent to rehabilitation under this article.

On April 14, 1988 the Commissioner petitioned the Court for the seizure of AUG pursuant to I.C. § 27-9-2-2 which

provides that the Commissioner may file such petition with respect to a domestic insurer. AUG complied with the Order of Seizure and made no formal request for a hearing to review the order of seizure.

On May 4, 1988, the Commissioner filed a Petition for Order of Rehabilitation of AUG, on the ground that reasonable cause existed to believe that AUG was in such condition as to render the continuance of its business financially hazardous to the public, to the subscribers of AIE, and to its creditors. A hearing was held August 9, 1988, at which time evidence was presented by both parties. Mark Tharp, Special Deputy to the Rehabilitator, testified that AIE held a 9%, $750,000 debenture due from AUG on June 29, 1988. Demand for payment was made on AUG, which obligation has not been fully paid. It

was Mr. Tharp's opinion, as a CPA, that AUG was insolvent by approximately $370,000 at March 31, 1988.

Dan Warfel, a partner with Peat Marwick Main & Company, testified at the hearing with regard to the relationship between AUG and AIE and the continuing ability of AUG to affect the financial condition of AIE. Warfel described his review of the financial information submitted by AUG to the Securities Exchange Commission for 1986, 1987 and 1988. He stated that the relationship between AIE and AUG dictates that the financial statements for both operations be set forth together and that the financial operations of AIE and AUG are intimately related from an investor, tax and financial standpoint.

Warfel further testified as to the tax election available to AIE and AUG

pursuant to § 826 (currently codified at § 835) of the Internal Revenue Code. The effect of this election is to consolidate the tax returns of AIE and AUG even though the returns are not technically consolidated. It permits AIE to be given a refund or credit for taxes paid by AUG. Under this election, if AUG were to experience a tax loss, it could carry that tax loss back three years or forward up to 15 years. If that were to happen, Warfel concluded the IRS then could pursue AIE for reimbursement of the refund or credits that the IRS had paid during those previous years which AIE had received as a result of the taxes paid by AUG.

On August 31, 1988, the trial Court denied the Commissioner's Petition for the Rehabilitation of AUG. On September 7, 1988, the Court directed entry of a

Final Judgment. On the same date, AUG informed the liquidator of AIE that it had filed an application with the IRS to carry back a 1987 net operating loss, thereby generating a refund of taxes paid by AUG in prior years. This action was taken without prior consultation with the Department as promised by counsel for AUG. On October 31, 1988, AUG received a tentative refund of approximately $2,000,000 with interest from the IRS, which remains subject to final determination by the Internal Revenue Service.

On April 10, 1990, the Indiana Court of Appeals determined that AUG was subject to Indiana's rehabilitation laws as an entity which was "doing business" as an "insurer" as those terms were defined under Indiana's insurance laws and reversed the trial court's

September 2, 1988 judgment. AUG's Petitions for Rehearing and for Transfer were denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Indiana Court of Appeals did not consider or decide a federal question.

AUG contends this Court's certiorari jurisdiction derives from 28 U.S.C. § 1257(a) which provides "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . a statute of any state is drawn in question on the ground of its being repugnant to the Constitution . . ." Jurisdiction under this section must fail if both requirements, that a federal question be raised and decided in the state court below, do not appear on the

record. Illinois v. Gates, 462 U.S. 213, 217-218 (1983). In McGoldrick v. Compagnie General Transatlantique, 309 U.S. 430, 434-435 (1940), the Court observed:

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by petitioner or appellant not pressed or passed upon in the courts below . . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.

In Cardinale v. Louisiana, 394 U.S. 437, 439, this Court considered the reasons behind this rule:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of the constitutional challenge, since the statute may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, (citation omitted) they should be given the first opportunity to consider them.

In this case, it is clear from a review of the Indiana Court of Appeals' opinion that it did not consider or decide the question now urged by AUG. The issues which the Indiana Court of Appeals decided were set forth on the first page of its decision:

ISSUES

1. Whether AUG, the attorney-in-fact for American Interinsurance Exchange (AIE), an unincorporated association in rehabilitation, is subject to the provisions of I.C. 27-9 providing for delinquency proceedings by the Commissioner.

2. Whether the Commissioner met his burden of proving AUG is in such condition as to render the continuance of its business financially hazardous to its policy-holders, creditors or the public.

(Appendix A-2.) Conspicuously absent from the Indiana Court of Appeals' opinion is any citation or reference to the Supremacy Clause or Section 109 of the Bankruptcy Code, the constitutional and statutory provisions which AUG now claims are involved. In its decision, the Indiana Court of Appeals stated that the first issue to be determined was one of statutory construction -- Indiana

statutory construction. The Court was called upon to construe the application of Ind. Code § 27-9-1 et seq. to an attorney-in-fact for an interinsurance exchange. It was never asked to consider nor did it decide whether its construction of Ind. Code § 27-9-1 et seq. was preempted by the Bankruptcy Code.

This Court has stated that when the highest court of a state has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state court, unless the aggrieved party in this Court can affirmatively show the contrary.[1/] Street v. New York, 394 U.S. 576, 582 (1969); Bailey v. Anderson,

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1/ AUG has not provided this Court with a certificate from the Indiana Court of Appeals showing that a federal question was raised and decided. It could not because no federal question was considered by the Indiana Courts.

326 U.S. 203, 206-207 (1945). In this case, AUG did fail to properly present the question. AUG admits that its argument that I.C. § 27-9 is subject to preemption by the Bankruptcy Code was first raised in its rehearing brief. AUG admits it failed to raise this argument as an affirmative defense to the Petition for Rehabilitation, that it failed to raise the argument during the rehabilitation proceeding, or to offer evidence in support of its argument, and that it failed to raise the argument on appeal.

It is a general rule of Indiana appellate law that any question or theory which has not been briefed or argued in the briefs on appeal cannot be raised for the first time in a Petition for Rehearing. New York Life Ins. Co. v. Henriksen, 421 N.E.2d 1117, 1118

(Ind.App. 1981). In Henriksen, the Court of Appeals reversed the trial court's judgment and the appellee filed a petition for rehearing asserting for the first time a new argument. As stated on appeal:

> In her petition for rehearing, Ms. Henriksen . . . not only challenges our opinion but seeks relief on a theory not heretofore argued. . . . Ms. Henriksen may not now raise a new argument or espouse a new theory. Any question which has not been briefed or argued in the briefs on appeal cannot be raised for the first time in a petition for rehearing. City of Indianapolis v. Wynn (1959), 239 Ind. 467, 159 N.E.2d 572. The petition is to be confined to those issues which were properly presented in the initial appeal and which were overlooked or improperly decided. Stucker v. College Life Ins. Co. of America (1965), 135 Ind.App. 422, 211 N.E.2d 320. As such, we will not consider Ms. Henriksen's contentions.

421 N.E.2d at 1118. See also City of Indianapolis v. Wynn, 239 Ind. 567, 159 N.E.2d 572 (1959); Hutchinson's Estate v.

Arnt, 210 Ind. 509, 4 N.E.2d 202 (1936); Data Processing Services, Inc. v. L.H. Smith Oil Corp., 493 N.E.2d 1272, 1273 (Ind.App. 1986). This rule has also been applied to questions of constitutionality. Constitutional questions must be raised or argued in the briefs on appeal or they cannot be considered. Kilgallen v. State, 192 Ind. 531, 137 N.E. 178 (1922); City of Indianapolis v. Wynn, 159 N.E.2d 572; Gardner v. City of Bluffton, 173 Ind. 454, 90 N.E. 898 (1910).

In addition, questions regarding the constitutionality of a statute must be raised in the trial court before they can be considered by the Indiana Court of Appeals. Linville v. Shelby County Plan Commission, 258 Ind. 467, 281 N.E.2d 884 (1972); Puntney v. Puntney, 420 N.E.2d 1283 (Ind.App. 1981); Alwood v. Davis, 411 N.E.2d 759 (Ind.App. 1980). AUG did

not raise this question before the trial court. The first time it was raised was in its Petition for Rehearing.

This Court has itself held that raising a federal question for the first time in a petition for rehearing is generally insufficient unless the court actually entertains the petition and expressly decides the question. Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945); Hanson v. Denckla, 357 U.S. 235, 243-44 (1958); Herndon v. State of Georgia, 295 U.S. 441, 443 (1935):

> Questions first presented to the highest state court on a petition for rehearing come too late for consideration here, unless the state court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition.

Radio Station WOW, 326 U.S. at 128. For example, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 (1975), the

Supreme Court's appellate jurisdiction was held properly invoked by virtue of the state court's express holding in denying a petition for rehearing, that "[a] majority of this court does not consider the statute to be in conflict with the First Amendment." In this case, however, the Indiana courts denied rehearing and transfer summarily and without opinion. Thus, there is no language from the Indiana courts indicating that this question was considered and disposed of.

AUG ignores this jurisdictional defect and argues that it could nonetheless properly raise this federal question on petition for rehearing. AUG cites International Longshoremen's Ass'n AFL-CIO v. Davis, 476 U.S. 380 (1986), as being "strikingly similar to this case." However, Davis is distinguishable from

this case in two very important respects. First, the Alabama Supreme Court in Davis, although holding that the International Longshoremen's preemption argument had been waived, stated in a footnote that if it had occasion to reach the merits, it would have found no preemption:

> The instant facts fall squarely within the "peripheral concern" exception to federal pre-emption of state jurisdiction of labor related disputes. (citation omitted.) The National Labor Relations Board has already determined that an employer's supervisors are not protected by the Labor Management Relations Act. Thus, in this case [Davis] has no remedy before the NLRB, and this dispute, although somewhat labor-related, is, at most, only of "peripheral concern" to the NLRB. (citations omitted.)

476 U.S. at 386. Consequently, there was language in the opinion indicating that the federal question had actually been considered and decided. In addition, the

question of whether NLRA preemption was waiveable rested on an erroneous view of the scope of Federal preemption, which was itself a matter of federal law. Thus, there was an actual decision of a federal question. In this case, the Indiana Court of Appeals did not actually decide a federal question. The question of whether I.C. § 27-9 and the Bankruptcy Code conflicted was never raised before the Indiana trial court or before the Indiana Courts of Appeal. The Indiana Court of Appeals did not even make a determination that this question had been waived.

Second, this Court in Davis held that NLRA preemption is not a waiveable defense. That is not the case with the preemption argument being made by AUG. The same question was considered by the court in In re Mader's Store for Men,

Inc., 77 Wis.2d 578, 254 N.W.2d 171 (1977). The court in Mader concluded that the Bankruptcy Act did not put an end to the power of the court to appoint a receiver for an insolvent corporation nor were the statutes declaring or regulating this power generally suspended by the Bankruptcy Code. 254 N.W.2d at 179, 180. Since the general creditor seeking to place the debtor into bankruptcy was not correct in asserting that the receivership provisions were suspended by the Bankruptcy Code, no jurisdictional defect was therefore presented:

> We think it clear that under the circumstances present in the case at bar, a court of equity might have appointed a receiver independent of any statute on the subject. But whether this is so or not, the fact that a receiver has been appointed at the instance of a simple contract creditor is not a jurisdictional defect. It is at

> most an error which may be waived by participating in the receivership as Gelatt has done. (citations omitted.)

254 N.W.2d at 182-183 (Emphasis added). As will be shown in more detail below, since the Indiana trial court's power to issue an order rehabilitating AUG is not suspended by the Bankruptcy Code, no jurisdictional defect was presented by AUG. AUG's argument was a waiveable defense and AUG waived it by failing to present it until the petition for rehearing.

In a last gasp attempt to save itself from these jurisdictional defects, AUG argues that it was shocked and surprised at the Indiana Court of Appeals' opinion; that the Indiana Court of Appeals did not follow the authorities which it had cited and did not consider In re Family Health Services, Inc., 104 B.R. 268 (Bankr. C.D. Cal. 1989), a case decided after this

matter was fully briefed in the Indiana Court of Appeals, but before the court of appeals' decision. However, these cases are not applicable to the question which was decided by the Indiana Court of Appeals. As shown by its opinion, the Indiana Court of Appeals did not overrule any existing law in rendering its decision. The argument that if AUG was subject to § 27-9, then § 27-9 was preempted by the Bankruptcy Code, was simply overlooked by AUG until after the Indiana Court of Appeals' opinion. AUG's arguments prior to the petition for rehearing were limited to claiming that it was not subject to I.C. § 27-9 and that if subject to I.C. § 27-9 then the Commissioner failed to prove sufficient facts which would constitute a statutory ground for a petition for rehabilitation under I.C. § 27-9-3-1. AUG never, before

the petition for rehearing, argued that I.C. § 27-9 was subject to preemption by the Bankruptcy Code. This argument, however, was available to AUG on the day that the Commissioner filed a petition for rehabilitation, May 4, 1988.

Since the Indiana Court of Appeals neither considered nor decided this question, this Court does not have jurisdiction of this matter.

II. AUG is an "insurance company" expressly excluded from the benefits and burdens of the Bankruptcy Code.

Assuming for purposes of argument that AUG has somehow properly raised this question and that this question has somehow been decided by the Indiana Court of Appeals, a rehabilitation proceeding under I.C. § 27-9 against AUG does not subject I.C. § 27-9 to preemption by the Bankruptcy Code because AUG is an

"insurance company" excluded from the benefits and burdens of the Bankruptcy Code. Pursuant to 11 U.S.C. § 109(b)(2) "a domestic insurance company" may not be a debtor under the Bankruptcy Code. Congress enacted this provision excluding insurance companies from the benefits and burdens of "liquidation under the bankruptcy laws because they are bodies for which alternative provision is made for liquidation under various state . . . regulatory laws." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 318-19 (1977); S. Rep. No. 95-989, 95th Cong. 2d Sess. 31 (1977). The rationale for excluding insurance companies from the Bankruptcy Code was explained in Sims v. Fidelity Assurance Ass'n, 129 F.2d 442, 448-449 (4th Cir. 1942):

> No reason for making these exceptions were assigned by the Committees of Congress, but they may be surmised to lie in the

> public or quasi-public nature of the business, involving interests other than those of creditors, and in the desirability of an unarrested operation, the completeness of state regulation, including provisions for insolvency, and the inappropriateness of the bankruptcy machinery to their affairs.

In arguing that it is not an insurance company, AUG relies upon cases which have determined that a health maintenance organization is not an insurance company within the meaning of § 109(b)(2). In re Family Health Services, Inc. (1989), Bankr. C.D.Cal., 104 B.R. 279; In re Family Health Services, Inc. (1989), Bankr. C.D. Cal., 104 B.R. 268. There is a split of authority as to whether a health maintenance organization is an insurance company. See In re Beacon Health, Inc., 105 B.R. 178; In re Portland Metro

Health, Inc. (1981), Bankr. D. Or., 15 B.R. 102. Nonetheless, whether a health maintenance organization is an insurance company is not dispositive of this case. The question to be decided here is whether an attorney-in-fact for a reciprocal insurance company has the status of an insurance company and is excluded from federal bankruptcy relief. This question has been decided previously, and it was decided against AUG. In In re International Underwriters, 157 F.Supp. 367 (W.D. Mo. 1957), the court considered the identical question now being raised -- whether an attorney-in-fact for a reciprocal insurance exchange has the status of an insurance company and is excluded from federal bankruptcy relief. After applying the state classification test and the independent classification test,

the court concluded that the attorney-in-fact was "an insurance corporation for the purposes of the Bankruptcy Act, and falls within the exception provided in Section 22(b), supra."[2/] 157 F.Supp. at 373.

In reaching this conclusion, the court in International Underwriters considered and dispensed with the same

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2/ The alternate relief test had not yet been articulated at the time of the International Underwriters' decision. See In re Republic Trust & Savings Co. (1986), Bankr. N.D.Okl., 59 B.R. 606. However, it, too, supports the conclusion that AUG is excluded from federal bankruptcy relief. The key question of this test is whether a federal bankruptcy proceeding is a satisfactory alternative to a state insolvency proceeding. Family Health Services, 104 B.R. at 277. In this case, it is not. It is not disputed that AIE is an insurance company and therefore not entitled to federal relief. Since AUG is indispensable to AIE because it transacts all business for AIE, both entities should be rehabilitated or dissolved together.

arguments now raised by AUG. In International Underwriters, an involuntary petition for bankruptcy was filed against International Underwriters, Inc., by a creditor. International Underwriters challenged the court's jurisdiction on the ground that it was an insurance corporation and therefore exempt from Title 11 of the Bankruptcy Act. The first argument presented by the creditor was that International Underwriters was not an insurance corporation "for the reasons that it issued no policies, collects no premiums, is not under the regulation of the state insurance department as an insurance company, and does not hold itself out to the public as an insurance company." 157 F.Supp. at 369. The creditor further argued that International Underwriters was but the agent for its principal, International

Indemnity Exchange. The court looked to the policy of insurance and determined that the attorney-in-fact, International Underwriters, was authorized to execute, modify and cancel insurance, and was authorized to collect premiums and to perform and function in many other areas of insurance management. The court also determined that International Underwriters was regulated by the department of insurance.

Similarly, in concluding that AUG was an Indiana insurer doing business in Indiana, the Indiana Court of Appeals properly looked to AUG's Inter-Insurance Certificate of Authority and to the Power of Attorney and Subscribers' Agreement. The Indiana Court of Appeals noted that AUG has the authority to make contracts of insurance. 552 N.E.2d at 52. Also, the Power of Attorney and Subscriber's

Agreement authorized AUG to "effect, modify and terminate contracts" and as stated in AUG's Articles of Incorporation, "to do all other things necessary, incidental, and convenient to carrying on an insurance business." Also, AUG's obligations and duties to the subscribers of AIE and to the Department are regulated by statute. 552 N.E.2d at 51; I.C. § 27-6-6-1 et seq.

It must be noted that under the State Classification Test urged by AUG, the analysis begins with whether the state law classifies the entity as one specifically excluded from being a debtor under § 109(b)(2). Here, while the Indiana Court of Appeals did not consider this question, it did determine that AUG is an insurer doing business in Indiana; it has done and is licensed to do insurance business under a license or

certificate of authority as an insurer issued by the Indiana Department of Insurance. Under the State Classification Test, the Court may also examine the state's statutes for characteristics common to excluded entities, those entities which conduct business of a public or quasi-public nature and are subject to extensive state regulation including a statutory scheme for liquidation or rehabilitation. Family Health Services, 104 B.R. at 273. It is apparent from the language contained in I.C. § 27-6-1-1 et seq., that the Indiana legislature intended and specifically provided for the regulation of the attorney-in-fact for a reciprocal or interinsurance exchange by the Department of Insurance just as it did for the reciprocal or interinsurance exchange. AUG is treated and classified

as other entities excluded from being a debtor under § 109(b)(2).[3/]

Finally, AUG asserts that it does not underwrite or spread risks. Again, this issue was addressed in International Underwriters, 157 F.Supp. at 371. The court in International Underwriters noted that the reciprocal provisions contained

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3/ AUG claims that it is not an insurance company because it was organized under Indiana's general corporate code, I.C. § 23-1, and not under the insurance law. AUG also claims that the absence of the word insurance in AUG's name is significant because I.C. § 27-1-6-3 requires that all insurance companies formed under I.C. § 27-1-6-1 include insurance in its name. AUG fails to note that reciprocal insurers are excluded from the formation provisions of the Indiana Insurance Law. See I.C. § 27-1-6-1. The fact that AUG was not formed under those provisions is of no consequence. As noted by the court in In re Beacon Health, Inc. (1989), Bankr., S.D. Tex, 105 B.R. 178, n.1, "Suffice it to say that if a sign is placed on a duck saying it is 'not a duck' that doesn't mean it is not a duck."

in the policy contained a limitation of liability precluding the attorney-in-fact from assessing the subscriber an additional premium should the claims for losses exceed the funds available for payment of losses. In addition, under Missouri statute, if at any time the amounts on hand were less than those required by law, the subscribers "or their attorney for them" shall make up the deficiency. 157 F.Supp. at 371.

In this case, the power of attorney contains a similar limitation of liability. In addition, I.C. § 27-6-6-6 provides if at any time the assets shall be less than required, "the subscribers or their attorney for them shall make up the deficiency within thirty [30] days after notice from the department of insurance. . . ." Ind. Code § 27-6-6-6 (1988). Thus, both the subscribers and

their attorney-in-fact assume the risk of paying claims. Under these circumstances, risk is assumed under Indiana law. International Underwriters, 157 F.Supp. at 371.

AUG claims that International Underwriters simply is not the law of Indiana. In support of this statement, AUG cites Wysong v. Automobile Underwriters, 204 Ind. 493, 184 N.E. 783 (1933). AUG claims under Wysong, an attorney-in-fact does not assume any risk and is not an insurer. This is incorrect. Under the Wysong decision, if the subscribers or their attorney voluntarily desire to make up the deficiency, they may do so. However, if not, then the State may revoke the right to continue business. Since the power of attorney prohibits AUG from assessing the subscribers to make up the deficiency,

AUG is faced with a decision. It can make up the deficiency and spread risk or be forced out of business. AUG has in the past decided to make up the deficiency and, in fact, invested nearly $8 million. AUG has engaged in risk-spreading.

AUG also completely ignores that language in Wysong which is contrary to its position. In Wysong, the court stated:

> The individuals interested appoint an attorney-in-fact for their particular purpose and business and he takes the place of an insurance company in every particular. . . .

184 N.E.2d at 785. The court in Wysong acknowledged that an attorney-in-fact was an insurance company in every particular.

AUG also claims that International Underwriters is contrary to Underwriters Exchange v. Indianapolis St. Ry. Co., 185 N.E. 504, because "an attorney-in-fact is neither an insurer or an insured." This

language is taken out of context. Underwriters Exchange concerned the question of whether an attorney-in-fact was the real party in interest in order to maintain an action against a tortfeasor who had damaged the property of one of the subscribers. There was no provision in the language of the power of attorney, either express or implied, which authorized the attorney-in-fact alone as plaintiff on behalf of the subscribers to maintain an action in any matter between the subscribers and a third party. See 185 N.E. at 506. Since there was no such language and since the attorney-in-fact had not paid any amounts to the subscribers directly, it could not maintain the action against the third party. In this case, the power of attorney specifically authorizes AUG to appear on behalf of the subscribers "and

to bring, prosecute, defend or otherwise settle suits, actions or proceedings." Under the Underwriters Exchange rationale, AUG could prosecute the action because it is authorized to act as an insurance company in every particular.

An attorney-in-fact is indispensable to the plan of reciprocal insurance. Wysong, 184 N.E. 783. All the business is done and transacted by an attorney-in-fact. As stated by the court in International Underwriters:

> To say that this attorney in fact is not engaged in the insurance business is to completely ignore the efficacy, intention and implications of the statutes of Missouri regulating reciprocal insurance, the reciprocal provisions themselves contained in each insurance policy, the charter powers conferred upon the attorney in fact, its principal activities, and lastly its classification by the State itself.

157 F.Supp. at 373. See also In re Manufacturing Lumbermen's Underwriters, 18 F.Supp. 114, 117 (D.C. 1936).

III. I.C. § 27-9 is not preempted by the Bankruptcy Code.

Even if AUG is determined not to be an "insurance company" under the Bankruptcy Code and, therefore, not excluded from bankruptcy relief, the application of I.C. 27-9 to AUG does not conflict with the Bankruptcy Code.[4/] AUG asserts that "the Bankruptcy Code preempts IC 27-9 specifically as to attorneys-in-fact who act as agents and

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4/ AUG argues that this argument is confusing and misleading. AUG claims that if it is not an insurance company, I.C. 27-9 does not apply. It is AUG who is confused. The Indiana Court of Appeals has determined that AUG is an insurer under Indiana law. I.C. 27-9. The Indiana Court of Appeals did not decide whether AUG was an "insurance company" under the Bankruptcy Code, [Foot note continued on next page.]

not as insurers . . . because they are not excluded from the Bankruptcy Code and therefore cannot be subjected to an insolvency statute such as IC 27-9 which is tantamount to bankruptcy . . . ." (Petition, p. 53.) Although AUG refers generally to the supremacy and preemptive effect of the federal bankruptcy

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[Foot note continued]

4/ and if not whether the Bankruptcy Code preempted I.C. 27-9, because those questions were never raised. Since this Court's only power over state court judgments is to correct them to the extent they incorrectly adjudge federal rights, this Court cannot disturb the Indiana Court of Appeals' decision that AUG is an insurer under Indiana law, even if that decision is incorrect. This Court may, however, determine that I.C. 27-9 is preempted by federal law. As will be shown below, even if this Court finds that it has jurisdiction and that AUG is not an "insurance company" under federal law, I.C. 27-9 still does not conflict with the Bankruptcy Code because no bankruptcy proceedings were initiated in this case and I.C. 27-9 does not provide a discharge to a debtor.

legislation, it makes no attempt to identify the specific theory of preemption under which I.C. § 27-9 is supposedly preempted by the Bankruptcy Code. Similarly, although AUG states that preemption of a state insolvency statute occurs whenever the state law conflicts with the national law of bankruptcy, it makes no attempt to define or explain why I.C. § 27-9 conflicts with the Bankruptcy Code. There are three established theories of preemption under the supremacy clause of the United States Constitution: express preemption of a specific area of state law by federal law; implied preemption of a specific area of state law by a pervasive scheme of regulation under federal law; and preemption of state law to the extent of actual conflict with the federal law. As explained by the United States Supreme

Court, "[a]bsent explicit language, Congress' intent to supersede state law altogether may be found from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.'" Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Com'n, 461 U.S. 190, 203-04, 103 S.Ct. 1713, 1722 (1983). On the other hand, "where Congress does not entirely displace state regulation in a specific area, state law is preempted to the extent it actually conflicts with federal law" such as "when 'compliance with both federal and state law is a physical impossibility' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. at 204, 183 S.Ct. at 172.

On the premise that it is not an insurance company excluded from the benefits and burdens of the Bankruptcy Code, AUG, quoting the early decision of International Shoe Co. v. Pinkus, 278 U.S. 261, 49 S.Ct. 108, (1929), argues that I.C. § 27-9 is preempted because it is the functional equivalent of the Bankruptcy Code and because the conflict between it and the Bankruptcy Code is so fundamental and pervasive. Apparently, AUG is arguing either that I.C. § 27-9 is generally preempted "by a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it" or that I.C. § 27-9 is partially preempted to the extent it actually conflicts with "the accomplishment and execution of the full purposes and objectives of Congress."

The argument that the Bankruptcy Code is a pervasive scheme of regulation generally preempting proceedings under I.C. § 27-9 proves too much and is inconsistent with the express provisions of the Bankruptcy Code. Taken to its logical conclusion, such an argument would require preemption of a vast majority of the state courts' undisputed equitable and statutory authority to effect a ratable distribution of the assets of an insolvent debtor among his creditors. See I.C. § 23-2-4-21 (appointment of receive for insolvent retirement home); I.C. § 27-1-47-1 et seq. (involuntary dissolution and "winding up" of insolvent corporations at the behest of creditors); I.C. § 32-12 et seq. (assignment for the benefit of creditors by individuals through trustees or court appointed receivers); I.C.

§ 34-1-12-1 (appointment of receivers for property of individuals, partnerships and corporations in an action by creditors to subject any property or fund to their claims and in other actions). Not surprisingly, the Bankruptcy Code itself expressly acknowledges the continuing validity of such state laws by providing among other things for the turnover of property held by receivers and trustees appointed under state law upon the initiation of proceedings under the Bankruptcy Code and for relief from the turnover provision where the receiver or trustee was appointed under state law more than 120 days prior to the initiation of proceedings under the Bankruptcy Code. See 11 U.S.C. § 543. See also, 11 U.S.C. § 303(h)(2).

The Wisconsin Supreme Court, considering prior versions of the statutes cited above, has stated:

> . . . It cannot be contended that the Bankruptcy Act put an end to the powers of courts of equity in this regard, Hazelwood, supra, nor that statutes declaring or regulating this power are generally suspended by the Bankruptcy Act. . . . We note . . . that today, after nearly eighty years in which bankruptcy legislation has continuously been in force, statutes declaring or regulating in greater or lesser detail the power of courts of equity over insolvent corporations remain on the books and in use in many if not most of the several states.
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> It is apparent from the Bankruptcy Act itself that the states retain considerable freedom of action with respect to insolvent debtors. The fifth act of bankruptcy consists of a person's having
>
> > "While insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property." 11 U.S.C. sec. 21(a)(5).

> Sec. 2a(21) of the Act authorizes the bankruptcy courts to require delivery to the trustee in bankruptcy of assets in a state court receiver's hands, provided the receiver was not appointed more than four months before the date of bankruptcy. [Footnote omitted]. In our opinion, these provisions reflect a congressional intent generally to preserve the validity of receiverships, whether voluntary or involuntary, created under state law, unless and until such proceedings are displaced pursuant to sec. 2a(21) by proceedings in a court of bankruptcy.

In re Mader's Store for Men, Inc., 254 N.E.2d 171, 179-80 (citations omitted, emphasis supplied). See also, Gallagher v. Keystone Realty Holding Co., 333 Pa. 9, 3 A.2d 426, 428 (1939). (The Supreme Court of Pennsylvania held that "[t]he Insolvency Act is not inconsistent with the Bankruptcy Act . . . simply because it authorizes appointment of a receiver in the circumstances alleged.")

Despite the sweeping statement quoted by AUG from the early decision of International Shoe Co. v. Pinkus, state laws which result in a ratable distribution of the assets of an insolvent debtor among his creditors are not generally preempted by a "pervasive scheme of regulation" established by the Bankruptcy Code. This fact is confirmed by the United States Supreme Court's decision in Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518 (1933), decided four years after Pinkus.

The fact that such laws are not generally preempted by the Bankruptcy Code does not, of course, exclude the possibility that the particular incidents of a state law might conflict with the Bankruptcy Code by obstructing the accomplishment and execution of the full purposes and objectives of Congress and

be subject to partial preemption under the actual conflict theory of preemption. However, there has historically been some uncertainty as to the standard upon which an actual conflict between a state law and the Bankruptcy Code is to be determined to exist. As explained and clarified by the Wisconsin Supreme Court:

> Some of the uncertainty in the area is traceable to the sweeping language used by the United States Supreme Court in International Shoe Co. v. Pinkus, supra. Courts have examined state legislation with an eye to determining whether it "occupies the same field" as the federal Act or offers a competitive alternative thereto. However, in Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518, 53 S.Ct. 262, 77 L.Ed. 469 (1933), a case decided after International Shoe Co. v. Pinkus, supra, the court upheld the provisions governing assignments for the benefit of creditors then contained in ch. 128, Wis.Stats., noting in the process that if creditors of the corporation so desired, they could put an end to the state assignment proceedings by instituting bankruptcy proceedings within the statutory

> four-month period. An assignment for the benefit of creditors results in the ratable distribution of non-exempt assets of an insolvent debtor among his creditors just as do proceedings in bankruptcy, and the bankruptcy court is available, as an alternative to the assignment proceedings, to the debtor and in most cases to his creditors as well. It is apparent that state legislation does not encroach in a forbidden way upon the field occupied by the Bankruptcy Act merely because it provides for a distribution of the assets of an insolvent corporation among its creditors, and we think this is true whether the proceeding is voluntary or involuntary in its inception. International Shoe Co. v. Pinkus must be read in the light of the Pobreslo Case, and the fact that the condemned Arkansas statutes provided for discharge of the debtor.

In Re Mader's Store for Men, Inc., 254 N.W. 2d at 181-82. (Emphasis supplied).

In light of the numerous undisputed state statutes which so provide, the express provisions of the Bankruptcy Code itself, and the United States Supreme Court's decision in Pobreslo v. Joseph M.

Boyd Co., the fact that a state law compliments or augments the Bankruptcy Code to some extent by providing a ratable distribution of the assets of an insolvent debtor among his creditors does not present an actual conflict with the Bankruptcy Code which requires the statute's partial preemption. Rather, construing International Shoe Co. v. Pinkus in light of Pobreslo, it becomes clear that a state statute presents an actual conflict with the Bankruptcy Code, and, is therefore subject to partial preemption, only when it interferes with the access of a debtor or his creditors to the benefits and burdens of the Bankruptcy Code, In Re Mader's Store for Men, Inc., 254 N.W.2d at 182, such as when a state statute purports to provide a debtor a discharge from his debts thereby eliminating the access of the

debtor's creditors to proceedings under the Bankruptcy Code, Pobreslo, 287 U.S. at 526, 53 S.Ct. at 264, distinguishing Pinkus, 278 U.S. at 268, 49 S.Ct. at 111 or, when a state statute purports to suspend the driver's license and registration of any motorist who failed to satisfy a judgment against him, even if the motorist received a discharge under the Bankruptcy Code, thereby eliminating the benefit of the discharge provided by the Bankruptcy Code. Here, I.C. § 27-9 does not interfere with the access of a debtor or his creditors to the benefits and burdens of the Bankruptcy Code.

In sum, AUG, through bold assertions, general references and superficial analysis, argues that the application of I.C. § 27-9 to it, as a debtor subject to the benefits and burdens of the

Bankruptcy Code, is preempted by the Bankruptcy Code. However, closer consideration dictates the conclusion that I.C. § 27-9 is not subject to general and partial preemption simply because it compliments or augments the Bankruptcy Code to some extent by providing for the ratable distribution of the assets of an insolvent debtor among his creditors. Moreover, closer consideration dictates the conclusion that I.C. § 27-9, as necessarily construed to permit the initiation of bankruptcy proceedings, does not limit the access of a debtor or his creditors to the benefits and burdens of the Bankruptcy Code and, therefore, is not subject to partial preemption by the Bankruptcy Code. Clearly, even if AUG were not excluded from the Bankruptcy Code, the application of I.C. § 27-9 to

AUG would not be preempted by the Bankruptcy Code and the proceedings thereunder against AUG would not be suspended, if at all, unless and until bankruptcy proceedings were initiated under the Bankruptcy Code. Here, no such proceedings were initiated.

IV. AUG has not raised a substantial federal question.

As shown above, the question now raised by AUG was not properly presented to the Indiana Court of Appeals and the Indiana Court of Appeals did not consider or decide it. However, even if this question was presented to and considered by the Indiana Court of Appeals, it does not merit the review of this Court. The same question as raised here was considered and decided in In re International Underwriters, 157 F.Supp.

367 (W.D. Mo. 1957), where it was determined that an attorney-in-fact for a reciprocal insurance exchange has the status of an insurance company and is excluded from federal bankruptcy relief. In re International Underwriters applied the state classification test and the independent classification test in concluding that the attorney-in-fact was an insurance corporation for the purposes of the Bankruptcy Code. In this case, the Indiana Court of Appeals has already determined that AUG is an insurance company pursuant to I.C. § 27-9. That determination turns upon its own facts. AUG has a certificate of authority issued by the Department of Insurance which authorizes it "to make contracts of insurance." A decision by this Court would not be as far reaching as AUG insists. AUG has not raised a

substantial federal question which would merit the review of this court.

CONCLUSION

For all the foregoing reasons, the Commissioner respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 90-1312

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

AMERICAN UNDERWRITERS GROUP, INC.,

Petitioner,

v.

HARRY E. EAKIN, as the Insurance Commissioner of the Department of Insurance of the State of Indiana,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS
SECOND DISTRICT

PETITIONER'S REPLY BRIEF

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LIST OF PARTIES

Petitioner American Underwriters Group, Inc., has no parent companies or subsidiaries to be listed pursuant to Rule 29.1.

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Petitioner American Underwriters Group, Inc., ("AUG") respectfully submits this reply to the Brief in Opposition filed by the Respondent ("Commissioner").

The federal question was adequately presented below.

The Commissioner notes that AUG has not provided this Court with a certificate from the Indiana Court of Appeals showing that a federal question was raised below. AUG has demonstrated that its federal question was raised by including pertinent portions of its petition for rehearing and its petition to transfer and the rulings of the Indiana Court of Appeals and Supreme Court thereon in its Appendix. (A-123, 126, 15, 16). No certificate is necessary in this case. See R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 156-157 (6th ed. 1986).

The Commissioner cites cases for the general rule of Indiana appellate law that a question or theory cannot be presented for the first time on a petition for rehearing or on appeal. The general rule has its limitations. The Indiana Supreme Court has said:

> While this court is not bound to consider questions presented, for the first time, on petition for rehearing, even if by an appellee, it may do so to affirm a judgment.

Alsman v. Walters, 184 Ind. 565, 111 N.E. 921, 922 (1916). The Indiana Court of Appeals has also said:

> A party may, on petition for rehearing, adduce additional authorities and arguments in support of the points properly made in the original briefs.

Louisville, E. & St. L. Consolidated R. Co. v. Berry, 9 Ind.App. 63, 36 N.E. 646, 647 (1894). Throughout this case, AUG has argued and briefed the point that IC 27-9 should not be construed to include

an attorney-in-fact such as AUG because AUG was an agent and not an insurer. AUG's constitutional argument serves to support the same point, and that argument is based upon the same evidence introduced before the trial court in this case.

The Commissioner claims that International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986), is distinguishable. He first asserts that the Indiana Court of Appeals did not actually consider and decide a federal question while the Alabama Supreme Court in Davis arguably did. That assertion fails to recognize the nature of the pre-emption issue considered by this Court in Davis which was stated to be "in the nature of a challenge to a court's power to adjudicate that may be raised at any time." Id. at 382 (emphasis added).

Referring to the Court's footnote 11 at the end of the discussion of the jurisdictional issue, commentators have interpreted Davis "to say that even if the state proceeding had gone to final judgment, the judgment could be set aside if in fact the claim had been preempted" by observing:

> After characterizing the effect of the labor preemption cases as ruling that federal tribunals have exclusive jurisdiction, the Court concluded that this exclusive jurisdiction preempts conflicting state court jurisdiction. "Consequently, a procedural default in state court does not protect a state-court judgment from preemption."

Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction § 4023 n.23.6 (1990 Supp. at 761, 764). The same commentary has further observed with regard to Davis:

> Invocation of the term "jurisdiction" clearly does not help answer the question addressed by the Court. The strength of its ruling must depend on

> the force of the underlying preemption policies. If indeed a final state judgment would remain subject to attack on the basis of a preemption argument never advanced in the state proceeding, it seems plausible to conclude that state courts are required by federal law to put aside ordinary pleading practices and entertain the argument at any time before final judgment. The extraordinary force thus attributed to labor preemption policies, however, does not have many counterparts in other areas. There must remain a vast number of federal claims and defenses, including preemption, as to which state courts can insist on adherence to their ordinary rules of pleading responsibility.

Id. (1990 Supp. at 762; emphasis added). In its footnote 11 in Davis, this Court expressly recognized bankruptcy as being a counterpart to the extraordinary force attributed to labor pre-emption policies.

The Commissioner next recognizes that Davis held that NLRA pre-emption is not a waivable defense, but he asserts that AUG's argument is waivable. He attempts to rely upon In re Mader's Store for Men,

Inc., 77 Wis.2d 578, 254 N.W.2d 171 (1977), which considered the same question, but his reliance is totally misplaced. He thus quotes from a portion of the opinion in Mader's which addressed the purely procedural question as to whether a receiver can be properly appointed at the instance of a "simple contract creditor" as opposed to a judgment creditor. Mader's correctly concluded that any such error was waived by participation in the receivership without objection. Id. at 254 N.W.2d 182-183. That conclusion, however, followed the discussion and conclusion on the separate question as to whether the statute authorizing the receivership was pre-empted or suspended which Mader's expressly recognized not to be waivable:

> Gelatt clearly has waived his right to assert most objections to the validity of the receivership.

> However, it is fundamental that parties cannot confer subject matter jurisdiction upon a court by waiver or consent. The United States Supreme Court has characterized proceedings under suspended state insolvency legislation as "utterly null and void," Straton v. New, 283 U.S. 318, 327, 51 S.Ct. 465, 75 L.Ed. 1060 (1931), and subject to collateral attack, International Shoe Co. v. Pinkus, 278 U.S. 261, 49 S.Ct. 108, 73 L.Ed. 318 (1929). If Gelatt is correct in asserting that the receivership provisions of ch. 128 are suspended, and if the jurisdiction of the circuit court depended thereon, subject matter jurisdiction would be absent. To that extent Gelatt's claims must be considered notwithstanding his participation in the receivership without complaint.

254 N.W.2d 176 (emphasis added). Mader's supports AUG and not the Commissioner on the jurisdictional issue as well as the merits of AUG's argument as shown below.

The Commissioner finally characterizes AUG's additional argument that the decision below could not have been reasonably anticipated as a "last gasp attempt." The fact of the matter is

that the Court of Appeals ignored pertinent precedents cited by AUG and based its decision on points never argued by the Commissioner. Underwriters' Exchange v. Indianapolis St. Ry., 204 Ind. 676, 185 N.E. 504, 506-507 (1933), specifically held that an attorney-in-fact is not an insurer under Indiana law. The Commissioner has chosen not to address that case in his jurisdictional argument, but he does later mistakenly attempt to distinguish it as will be shown below. Indiana Dept. of Revenue v. American Underwriters, Inc., 429 N.E.2d 306 (Ind. Ct. App. 1981), rehearing denied, 431 N.E.2d 528 (1982), specifically concluded that AUG is separate and distinct from American Interinsurance Exchange ("AIE") for tax purposes and in doing so recognized AUG's role in the insurance operation:

> All assets of [AIE] are subject to the liability of the insurance operation, but none of the assets of [AUG] are available to those claimants.

429 N.E.2d at 311. Surprisingly, the Commissioner himself has chosen not to address that case at all in his Brief in Opposition. The decision below was indeed a surprise, and procedural rules are inapposite in this case for that reason and for all of the other reasons previously given by AUG.

AUG is not an "insurance company."

AUG has previously addressed the cases cited by the Commissioner in his argument that AUG is an "insurance company" excluded from the Bankruptcy Code. The Commissioner here attempts to distinguish Underwriters' Exchange on the ground that the power of attorney in that case did not authorize the attorney-in-fact to maintain an action on

behalf of the subscribers in any matter against a third party while the power of attorney in this case authorizes AUG "to bring, prosecute, defend or otherwise settle suits, actions or proceedings." He thus concludes that AUG could prosecute the action against a tortfeasor who damaged the property of a subscriber under the rationale of Underwriters' Exchange.

The Indiana Supreme Court expressed its rationale to the contrary:

> If appellant could be treated as the insurer, and was compelled to pay the loss occasioned by the party primarily responsible therefor, as asserted in the instant case, there would be a basis for saying that it should be subrogated to the rights of the insured, on the principle that subrogation is a normal incident to indemnity insurance, although the contract of the subscriber has no stipulation to that effect.
>
> But the fact must not be overlooked that reciprocal or interinsurance contracts are distinguishable from all other forms of insurance, in that

> every insured is an inter-insurer and every insurer is insured. Appellant [the attorney-in-fact] is neither an insurer or insured. It has suffered no loss. While it was the medium through which the loss was paid, such payment tended to deplete only the account of the subscribers. Since it has been held that an interinsurance subscriber, for loss sustained, may maintain an action against a cosubscriber for his proportionate liability, notwithstanding such subscriber's contract provided that such actions should be against the attorney in fact, under the circumstances of the present case we are not prepared to say that even a stipulation in the power of attorney authorizing appellant in its own name to sue appellee would be sufficient to meet the provisions of our Code requiring that "every action must be prosecuted in the name of the real party in interest."

185 N.E. at 506-507 (citations omitted and emphasis added). While an attorney-in-fact may be indispensable to reciprocal insurers, it is not an insurer itself under the rationale of Underwriters' Exchange.

The Commissioner further attempts to gain support from dicta quoted from a

general source in Wysong v. Automobile Underwriters, Inc., 204 Ind. 493, 184 N.E. 783 (1933). As previously demonstrated by AUG, Wysong supports AUG and not the Commissioner. Wysong was decided on March 13, 1933, by the same Supreme Court of Indiana which decided Underwriters' Exchange on May 15, 1933, and it is not inconsistent with the rationale of Underwriters' Exchange.

The Bankruptcy Code pre-empts the application of IC 27-9 to AUG.

The Commissioner next argues that even if this Court finds that it has jurisdiction and that AUG is not an "insurance company," IC 27-9 still does not conflict with the Bankruptcy Code because no bankruptcy proceedings were initiated. Contrary to the Commissioner's assertion, AUG has explained why the application of IC 27-9

to AUG conflicts with the Bankruptcy Code in demonstrating that IC 27-9 establishes an exclusive and comprehensive scheme precluding the availability of any alternative "for the purpose of liquidating, rehabilitating, reorganizing or conserving" entities subject to its provisions. As previously indicated, AUG is not contending that the Bankruptcy Code pre-empts the application of other state statutes involving receiverships or assignments for the benefit of creditors which do not conflict with the Bankruptcy Code and which do not preclude the availability of the bankruptcy courts like the application of IC 27-9 to AUG does.

The Commissioner's own authorities support AUG. He thus cites Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518 (1933), which upheld a state statute providing

for assignments for the benefit of creditors, and at pages 58-59 of his Brief in Opposition, he quotes the discussion of the rationale of Pobreslo in In re Mader's Store for Men, Inc., supra, including the following:

> An assignment for the benefit of creditors results in the ratable distribution of non-exempt assets of an insolvent debtor among his creditors just as do proceedings in bankruptcy, and the bankruptcy court is available, as an alternative to the assignment proceedings, to the debtor and in most cases to his creditors as well.

254 N.W.2d at 181.

IC 27-9 does not result in a ratable distribution of a debtor's assets like the state statute in Pobreslo did. Rather, IC 27-9-3-40 (A-115) establishes a preferential priority of distribution for the payment of claims which "is anathema to the basic tenet of federal bankruptcy law." In re Family Health

Services, Inc., 104 B.R. 268, 277-278 (Bankr. C.D. Cal. 1989).

Nor is bankruptcy available as an alternative to the proceedings authorized by IC 27-9 like bankruptcy was available to the assignment proceedings authorized by the state statute in Pobreslo. IC 27-9-1-3 (A-45) thus provides that no person except the Commissioner may commence a proceeding "for the purpose of liquidating, rehabilitating, reorganizing, or conserving" the debtor, that no such action may be entertained except in accordance with IC 27-9, and that no such action may be brought except in the Marion Circuit Court.

IC 27-9 clearly conflicts with the Bankruptcy Code and does interfere with the access of a debtor as well as its creditors to the bankruptcy courts. By the Commissioner's own admission at page

60 of his Brief in Opposition, IC 27-9 thus undeniably presents an actual conflict with the Bankruptcy Code if it is applied to AUG.

As AUG has previously demonstrated, it is the conflict of such laws which gives rise to the issue of pre-emption. The issue is not dependent upon the initiation of bankruptcy proceedings. There were in fact no bankruptcy proceedings in International Shoe Co. v. Pinkus, 278 U.S. 261 (1929).

AUG has raised a substantial federal question.

According to the Commissioner, the federal question presented in this case does not merit the review of this Court because of the decision in In re International Underwriters, Inc., 157 F. Supp. 367 (W.D. Mo. 1957). That decision is contrary to Underwriters' Exchange,

Wysong, and Indiana Dept. of Revenue v. American Underwriters, Inc., supra, and as a precedent in this case, it is further contrary to all of the authorities cited by AUG illustrating the proper analysis of the different tests for determining who may be excluded from the Bankruptcy Code and thus subjected to the plenary power of the states under a statute such as IC 27-9.

The Commissioner says that AUG has a certificate of authority which authorizes it "to make contracts of insurance." Like the Indiana Court of Appeals, the Commissioner ignores the fact that the certificate of authority only authorizes AUG to make contracts of insurance "as such Attorney-in-fact, and as far as it may be legally empowered by it's [sic] letter of appointment as such attorney." (A-3). The power of attorney authorizes

AUG only to act "on Subscriber's behalf." (A-4). AUG was thus appointed and acted as an agent for the subscribers of AIE, and the Commissioner fails to acknowledge that fact throughout his Statement of the Case.

The Commissioner has emphasized that AUG is indispensable to AIE because it transacts all business for AIE. The fact that AIE acts only through AUG as its agent is no different from the fact that any corporation acts only through its agents and employees.

AUG was an agent and not an insurer. The logic of the published decision below stands as a precedent threatening to any insurance agent which should be corrected by this Court and thus avoided in the future.

Conclusion

AUG respectfully requests that its petition for a writ of certiorari be granted.

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